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No. ____

In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The facts of this § 5 appeal are similar to those presented in *Riley v. Kennedy*, No. 07-77. That case concerned the application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to a gubernatorial appointment filling a vacancy on the Mobile County Commission and the Alabama Supreme Court decisions requiring that appointment. This case involves an appointment to the Jefferson County Commission made pursuant to those same Alabama Supreme Court decisions. As was the case for Mobile County, there is a local law that provides for special elections to fill vacancies on the Jefferson County Commission, while the general law applicable to the entire State provides for gubernatorial appointment. However, and also like the Mobile County case, the Jefferson County local law, Act No. 77-784, violates the Alabama Constitution for reasons wholly unrelated to voting. *See Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Accordingly, state law requires Governor Riley to appoint, and he has done so.

The plaintiff filed this litigation raising § 5 claims, Docket No. 1, and he later amended the complaint to include additional claims, Docket No. 5. He also moved for a preliminary injunction. Docket No. 6. The three-judge district court conducted a hearing to consider the plaintiff's motion for preliminary injunction and then skipped to the merits, entering a judgment ordering that Governor Riley's appointment be vacated if not precleared. The permanent injunctive relief was structured so that it would automatically spring into being, "without further order of th[e] court," if the

Governor's appointment was not precleared by a date certain. *See* Amended Judgment, Appendix 16a. By order dated April 18, 2008, this Court stayed the district court's judgment. *See Riley v. Plump*, No. 07A841.

This appeal presents the following questions:

1. Whether the decisions of a covered jurisdiction's highest court concerning the validity of a precleared state law, or, in the alternative, an appointment made by the Governor of the State in compliance with those decisions, requires preclearance pursuant to § 5.

2. Whether § 5 requires preclearance of the implementation of a practice in force and effect on the coverage date of November 1, 1964.

3. Whether the district court erred when it entered judgment after briefing and oral argument on the plaintiff's motion for preliminary injunction, without providing the notice required by Fed.R.Civ.Proc. 65(a)(2).

PARTIES TO THE PROCEEDINGS

BOB RILEY, in his official capacity as Governor of the State of Alabama, is the appellant in this case and was the defendant below.

FRED L. PLUMP is the appellee in this case and was the plaintiff below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 8

STATEMENT OF THE CASE 8

A. Legal Proceedings. 8

B. Statement of Facts 13

ARGUMENT 15

I. A decision by a covered jurisdiction's highest court that a precleared state law is unconstitutional and, thereby, invalid as a matter of state law is not a change that requires preclearance 16

A. Text 17

B. Legislative History 18

C. Supreme Court Precedent 18

D. An Unconstitutional Statute Cannot Serve as the Baseline 19

II. The district court's conclusion that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* require preclearance raises serious constitutional and workability concerns 22

III. The practice of gubernatorial appointment is not subject to § 5's preclearance requirement because it was the State's practice on Alabama's § 5 coverage date of November 1, 1964 25

IV. The district court erred by entering final judgment after briefing and oral argument on a motion for preliminary injunction and without giving notice required by Fed.R.Civ.P. 65(a)(2) 30

CONCLUSION 33

APPENDIX

Memorandum Opinion 1a

Judgment 12a

Order 14a

Amended Judgment 16a

Order 19a

Order 21a

Plaintiff's Motion to Amend Judgment (Doc. 29) 22a

Defendant Governor Bob Riley's Response to Plaintiff's Motion to Alter or Amend 24a

Governor Riley's Notice in Response to the Memorandum Opinion and Judgment of the Court 31a

Governor Riley's Notice of Filing Preclearance Submission 34a

Notice of Appeal to the Supreme Court of the United States 37a

42 U.S.C. § 1973c 41a

Ala. Act No. 77-784 ..... 44a

Ala. Act No. 2004-455 ..... 50a

Ala. Act No. 2007-488 ..... 51a

Ala. Const. Art. IV, § 105 ..... 53a

Stokes v. Noonan, 534 So.2d 237 (Ala. 1988) 54a

Riley v. Kennedy, 928 So.2d 1013 (Ala. 2005) 64a

Second Notice of Appeal to the Supreme Court of the United States 72a

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 19-20

Alaska Dep't of Envtl. Conservation v. EPA,
540 U.S. 461 (2004) 21-22

Armour v. Ohio,
775 F.Supp. 1044 (N.D. Ohio 1991) (three-judge court) 3

Beer v. United States,
425 U.S. 130 (1976) 18, 28

Bond v. White,
508 F.2d 1397 (5th Cir. 1975) 3

Branch v. Smith,
538 U.S. 254 (2003) 18-19

Catlin v. United States,
324 U.S. 229 (1945) 7-8

City of Lockhart v. United States,
460 U.S. 125 (1983) 4, 8, 20-21, 22

Coyle v. Smith,
221 U.S. 559 (1911) 23

Ex parte Southern Railway,
556 So.2d 1082 (Ala. 1989) 20

Gordon v. Executive Comm. of the Democratic Party of Charleston,
335 F.Supp. 166 (D.S.C. 1971) (three-judge court) (per curiam) 3

Hathorn v. Lovorn,
457 U.S. 255 (1982) 18, 19

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,
452 U.S. 264 (1981) 23

Idlewild Bon Voyage Liquor Corp. v. Epstein,
370 U.S. 713 (1962) 7

Kennedy v. Riley,
445 F.Supp.2d 1333 (M.D. Ala. 2006) (three-judge court), on appeal as *Riley v. Kennedy*, No. 07-77 ..... passim

Kennedy v. Riley,
____ F.Supp.2d _____, 2007 WL 1284912 (M.D. Ala. May 1, 2007) (three-judge court), on appeal as *Riley v. Kennedy*, No. 07-77 ..... 5-6, 22

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 27

Marbury v. Madison,
5 U.S. (1. Cranch.) 137 (1803) 17, 24, 30

Miller v. Johnson,
515 U.S. 900 (1995) 19-20

Moses H. Cone Memorial Hospital v. Mercury Const. Corp.,
460 U.S. 1 (1983)..... 7

NAACP v. Hampton County Election Comm'n,
470 U.S. 166 (1985)..... 26

New York v. United States,
505 U.S. 144 (1992)..... 23

Perkins v. Matthews,
400 U.S. 379 (1971)..... 20-21

Plump v. Riley,
____ F.Supp.2d ____, 2008 WL 192826
(M.D. Ala. Jan. 22, 2008)..... passim

Presley v. Etowah County Comm'n,
502 U.S. 491 (1992)..... 24, 26, 27

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002)..... 24

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000)..... 17

Riley v. Kennedy,
928 So.2d 1013 (Ala. 2005)..... passim

Shaw v. Reno,
509 U.S. 630 (1993)..... 17

South Carolina v. Katzenbach,
383 U.S. 301 (1966)..... 18

Stokes v. Noonan,
534 So.2d 237 (Ala. 1988) ..... passim

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 31-32

Young v. Fordice,
520 U.S. 273 (1997) 22, 27

Constitutional Provisions

U.S. Const. amend. XIII 2, 11

U.S. Const. amend. XIV 2, 11

U.S. Const. amend. XV 2, 11

Ala. Const. Art. IV, § 105 ..... 9, 13

Statutes and Acts

28 U.S.C. § 2101(b) 1, 5, 7

28 U.S.C. § 2284 1

Ala. Act No. 77-784 ..... i, 9, 13, 14, 20, 32

Ala. Act No. 85-237 ..... 9, 23-24

Ala. Act No. 2004-455 ..... 10, 24

Ala. Act No. 2007-488 10

Code of Alabama (1940), T. 12, § 6 25

Voting Rights Act
42 U.S.C. § 1973, *et seq.* ..... passim

Section 2
42 U.S.C. § 1973..... 2, 3, 11, 29

Section 4
42 U.S.C. § 1973b..... 25, 28

Section 5
42 U.S.C. § 1973c..... passim

Other Authorities

11 Cong. Red. 10,727 (1965) (Sen. Tydings)..... 18, 28

28 C.F.R. § 51.12 26

52 Fed. Reg. 486, 488 (1987)..... 26

Fed.R.Civ.Proc. 54(b)..... 2-3

Fed.R.Civ.Proc. 58..... 3

Fed.R.Civ.Proc. 65(a)(2) ..... ii, 4, 16, 30, 31, 32

H.R. Rep. No. 94-196..... 18

Pub. L. No. 91-825, § 3,
84 Stat. 314 (1970) 28

Pub. L. No. 94-73, § 101,
89 Stat. 400 (1975) 28

Pub. L. No. 97-205, § 2(b)(4),
96 Stat. 131 (1982) 28

Pub. L. No. 109-245, § 7,
120 Stat. 577 (2006) 28

Riley v. Plump,
Case No. 07A841 ..... ii, 7

Sup. Ct. R. 18.2 8

JURISDICTIONAL STATEMENT

Bob Riley, in his official capacity as Governor of the State of Alabama, appeals from the decision of the three-judge district court declaring that his appointment of General George F. Bowman to a vacant seat on the Jefferson County Commission is subject to the preclearance requirements of § 5, and ordering that the appointment be vacated without further order if not precleared.

OPINIONS BELOW

The district court's Memorandum Opinion has not yet been published, but appears as *Plump v. Riley*, ___ F. Supp. 2d ___, 2008 WL 192826 (M.D. Ala. Jan. 22, 2008) (three-judge court), and is reprinted at Appendix 1a. The district court's original judgment is reprinted in the Appendix at 12a, the amended judgment at Appendix 16a, and the order regarding the Amended Judgment at 14a.

JURISDICTION

This case arises under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Appendix 41a. Jurisdiction in the three-judge district court and in this Court is proper pursuant to 42 U.S.C. § 1973c(a), which states, in pertinent part, "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." On March 22, 2008, within 60 days of the date of the judgment, *see* 28 U.S.C. § 2101(b), Governor Riley filed his Notice of Appeal. Appendix 37a. For reasons that will be explained below, Governor Riley

filed a second Notice of Appeal on May 20, 2008. Appendix 72a.

The district court's judgment, even as amended, is curious, and Governor Riley has expressed concerns about its finality since it was issued. *See* Response to Plaintiff's Motion to Amend, Appendix 24a; Notice, Appendix 31a; Notice of Appeal, Appendix 37a. He set out three concerns in his response to the plaintiff's motion to alter or amend the original judgment, *see* Appendix 25a-27a, and each of these is addressed here in order to show why, on balance, this Court should conclude that it now has jurisdiction.[1]

1. The first concern expressed by the Governor was that the three-judge court did not resolve all the claims in the plaintiff's amended complaint. Appendix 25a. Specifically, the court failed to address plaintiff's claims raised under § 2 of the Voting Rights Act and the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. *See* Amended Complaint, Docket No. 5. Nor did the District Court cite Fed.R.Civ.Proc. 54(b), which provides that when there are multiple claims, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

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[1] As discussed below, the district court's judgment in this case is materially different from the non-final declaratory judgment of coverage initially entered in *Riley v. Kennedy*, No. 07-77. *See Riley v. Kennedy*, 07-77, Bl. Br. at 17-22; *id.*, Yellow Br. at 1-2. To argue that the judgment in this case should be treated as final is in no way a retreat from Governor Riley's position concerning jurisdiction in *Riley v. Kennedy*.

reason for delay."[2] However, this is not a bar to jurisdiction.

The unresolved claims must be resolved by a single judge, not the three-judge court. *See* 42 U.S.C. § 1973c (providing that § 5 claims are resolved by a three-judge court); *Bond v. White*, 508 F.2d 1397, 1400-1401 (5th Cir. 1975) (three-judge court properly remanded remaining claims to single-judge court after deciding § 5 claims); *Gordon v. Executive Comm. of the Democratic Party of Charleston*, 335 F.Supp. 166, 170 (D.S.C. 1971) (three-judge court) (per curiam) (holding that claims not committed to a three judge court "can be asserted only before the [single-judge] District Court"). *But see Armour v. Ohio*, 775 F.Supp. 1044, 1048 (N.D. Ohio 1991) (three-judge court) (holding that once a three-judge court is convened, it has jurisdiction to consider all the claims in the case). Thus, all claims properly before the three-judge court were addressed on the merits.[3]

2. The second concern expressed by the Governor was that the court may have lacked authority to skip

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[2] The district court did not mention Rule 54(b) or make the determinations required by the Rule. The judgment directed the clerk to enter the judgment as a final judgment pursuant to Fed.R.Civ.Proc. *58*. Amended Judgment, Appendix 16a.

[3] Notably, neither the plaintiff nor the district court has taken *any* further action with respect to the plaintiff's remaining claims. In any event, it would make no sense, and would not further the interests of judicial economy, to require Governor Riley to wait upon resolution of the single-judge claims before appealing to this Court. Any appeal of those single-judge claims would be lodged in the Eleventh Circuit: While § 5 provides for direct appeals to this Court, 42 U.S.C. § 1973c(a), § 2 has no such provision, 42 U.S.C. § 1973.

to final judgment when the motion pending before the court was for a preliminary injunction. Appendix 25a-26a. Upon reflection, this is not an issue of finality or jurisdiction at all. There is, however, an issue concerning whether Governor Riley received notice to which he was entitled pursuant to Fed.R.Civ.P. 65(a)(2), and that issue is discussed below. *See* Section IV, below.

3. The third concern expressed by the Governor was that the court's remedy order provided for what can only be described as contingent, springing injunctive relief. *See* Appendix 26a-27a.

The district court acted as a *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), court, considering "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *Id.* As to the first inquiry, the district court held that the Governor's appointment was a change that must be precleared. Memorandum Opinion, Appendix at 7a. As to the second, the parties agreed that the change, if there was a change, had not been precleared. As to remedy, the district court ordered that the Governor had 90 days to obtain preclearance, and that if the appointment was not precleared within such time, the appointment "shall be vacated 90 days from January 22, 2008 without further order of th[e] Court." *See* Amended Judgment, Appendix 16a. Had Governor Riley appealed to this Court immediately, rather than seeking preclearance, the appointment would have been vacated on February 5, 2008. Appendix 16a.

Accordingly, the court's remedy was that the Governor's appointment might be vacated on February 5, 2008, or it might be vacated on April 21, 2008 (90-days from January 22, 2008), or it might not be vacated at all (if preclearance were timely obtained).

Consistent with the district court's order, the Governor noticed his intent to seek preclearance, Appendix 31a, thereby eliminating the possibility that the appointment would be vacated on February 5. Out of an abundance of caution, Governor Riley noticed his appeal on March 22, 2008, Appendix 37a, within 60 days of the January 22 Judgment, the January 25 Amended Judgment, and the February 5 potential vacatur. Hence, to the extent that the court's judgment was final on any of these dates, the March 22 notice of appeal was timely filed. 28 U.S.C. § 2101(b).

While the district court's judgment in this case is different from the piecemeal orders of the district court in *Riley v. Kennedy*, No. 07-77, the jurisdictional arguments raised by the Appellees in *Kennedy* influenced Governor Riley's decision to appeal at this time. There, the district court initially ruled only that the Governor's appointment must be precleared, and made no remedy order whatsoever. *Kennedy v. Riley*, 445 F.Supp.2d 1333 (M.D. Ala. 2006) (three-judge court). The district court determined it would do nothing until the United States Department of Justice ruled on preclearance and that it would revisit the remedy issue at that time. *Id.* Only when preclearance was denied did the district court order that the Governor's appointment to the Mobile County Commission be vacated, thereby finally resolving the case. *Kennedy*

v. Riley, ___ F.Supp.2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007) (three-judge court). The appellees in *Kennedy* argued that Governor Riley should have appealed before the district court entered its remedy order. Governor Riley disagrees, for the reasons stated in his briefs in that case, but to avoid a replay of the argument – and out of an abundance of caution – Governor Riley opted in the very different circumstances of this case (and particularly in light of the district court's contingent, springing remedy order) to appeal when he did.

As the April 21, 2008 deadline to achieve preclearance approached, Governor Riley sought a stay pending appeal from the district court. Docket No. 42. The court denied the motion, but stayed its judgment "until the earlier of sixty days from the date of the preclearance submission [*i.e.*, until May 19, 2008], or the date of the written response by the Attorney General to [the] preclearance submission." Docket No. 45.[4] Under this order, the Governor's appointment might have been vacated at any time between April 21, 2008 (the judgment's original deadline) and May 19, 2008 (the final date authorized by the district court stay), depending on when and how the United States Department of Justice acted.[5]

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[4] The court did open the door to a request for a further motion to stay in the event that the USDOJ requested more information, rather than making a final determination, within the 60-day window provided to it by § 5. Docket No. 45.

[5] By letter dated May 8, 2008, USDOJ requested more information. Accordingly, the preclearance submission remains pending.

Unconvinced that the district court's stay order protected his interests, Governor Riley sought a stay pending appeal in this Court and the stay was granted. *See Riley v. Plump*, No. 07A841. Accordingly, the Governor's appointment will not be vacated unless this appeal is finally resolved against him and the State is unable to obtain preclearance.

On May 20, 2008, Governor Riley filed a second notice of appeal. Appendix 72a. This notice was filed within 60 days of the original April 21 deadline as well as within 60 days of the variable deadline set by the district's stay order (May 19 or sooner). Hence, to the extent that the district court's judgment was final on any of these dates, the May 20 notice of appeal was timely filed. 28 U.S.C. § 2101(b).

In sum, the jurisdictional issue sets up very differently here than it did in *Riley v. Kennedy*. There, for reasons explained in the Governor's briefs, the district court's preliminary declaratory judgment of § 5 coverage was not final. Here, by contrast, while it was unclear in late January which – if any – remedy would materialize, it was clear that Governor Riley was "effectively out of court." *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 10 (1983) (judgment was final for purposes of appellate jurisdiction when the district court's order put the appellant "effectively out of court"). *Accord, Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). By stating up front that Governor Riley's appointment would be vacated "without further order of th[e] court," the district court took pains to ensure that its adjudication of the § 5 claim left "nothing for the court to do but execute the judgment." *Catlin v.*

United States, 324 U.S. 229, 233 (1945). Since then, four months have passed, and Governor Riley has filed two notices of appeal – covering the entire range of dates on which the court's judgment might have become final. This Court's stay order is the only reason that the Governor's appointment has not yet been vacated. On balance, then, this Court should conclude that the district court's order has achieved finality and that one or the other of the notices of appeal was timely filed, such that this Court has jurisdiction over this appeal.[6]

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the application of § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Appendix 41a. While the application of § 5 in this case raises constitutional concerns, those concerns were not addressed by the three-judge court. Rather, that court simply applied the test set out in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

STATEMENT OF THE CASE

A. Legal Proceedings.

This § 5 litigation involves two decisions of the Alabama Supreme Court, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), and their effect on the method of filling vacancies on the Jefferson County Commission. These decisions are reprinted in the Appendix at 54a and 64a. respectively.

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[6] Pursuant to Supreme Court Rule 18.2, this Jurisdictional Statement is filed for both notices of appeal.

From 1868 until 2004, Alabama's general law provided that vacancies on the county commissions of the State's 67 counties were to be filled by gubernatorial appointment. Stipulations, Docket No. 19 at ¶ 1. A handful of counties had contrary local laws. A 1985 local law, Act No. 85-237, provided for the filling of vacancies on the Mobile County Commission by special election. That Mobile County local law was the subject of *Stokes v. Noonan* and *Riley v. Kennedy* in the Alabama Supreme Court, and of *Riley v. Kennedy*, No. 07-77, in this Court.

A separate local law, Act No. 77-784, applied to Jefferson County. Appendix 44a. Like the Mobile County local law, the Jefferson County local law provided for a special election to fill commission vacancies, *id.*, and was precleared, Stipulations, Docket No. 19 at ¶ 4. Two back-to-back vacancies occurred in Jefferson County in 1982 and were filled by special election. However, in 1988, the Alabama Supreme Court held that a local law violates § 105 of the Constitution of Alabama (1901), reprinted at Appendix 53a, if it provides one means of filling vacancies when a general law provides another means. *Stokes v. Noonan*, 534 So. 2d 237 (1988). *Stokes v. Noonan* arose in Mobile County and did not specifically consider the Jefferson County local law, but it established a rule of law that applies to local laws, such as Act No. 77-784, that share the same unconstitutional characteristics as the Mobile County local law. Therefore, when the next vacancy occurred on the Jefferson County Commission (in 2001), the practice of special election was abandoned, the vacancy was filled by gubernatorial appointment (by then-Governor Don Siegelman, a Democrat), *see* Stipulations, Docket 19 at ¶ 5, and no one challenged that appointment under § 5.

In 2004, the general law of Alabama was amended to allow for local laws requiring special elections to fill vacancies. Act No. 2004-455, reprinted at Appendix 50a. However, the Alabama Supreme Court held that the 2004 amendment failed to include unambiguous language requiring retroactive application and, thus, it did not give effect to the prior-passed (1985) Mobile County local law. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). By the same reasoning, the 2004 amendment is inapplicable to the prior-passed (1977) Jefferson County local law.[7]

In October 2007, Jefferson County Commissioner Larry Langford was declared the winner of the Birmingham mayoral election, Stipulations, Docket No. 19 at ¶ 7. Assuming the new office would cause a vacancy on the county commission, local officials scheduled a special election pursuant to Act No. 77-784, Docket No. 19 at ¶ 8. On November 13, 2007, Langford resigned his commission seat. *Id.* at ¶ 7. Plaintiff filed his original complaint on November 16, 2007. Docket No. 1. On November 21, 2007, Governor Riley appointed General George F. Bowman to the vacant commission seat. Docket No. 19 at ¶ 19.

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[7] In 2007, the general law was again amended by Act No. 2007-488, reprinted at Appendix 51a. The 2007 amendment, which has not been precleared, contains the same language as the 2004 amendment to allow exceptions for subsequently-passed local laws. Also like the 2004 amendment, the 2007 amendment does *not* contain unambiguous language specifying that it would apply retroactively. The meaning of the 2007 amendment, and whether it may be applied retroactively, is one of the issues in the appeal pending before the Alabama Supreme Court, discussed below.

On November 27, 2007, plaintiff filed an amended complaint adding claims of violation of § 2 of the Voting Rights Act and of his rights under the Thirteenth, Fourteenth, and Fifteenth Amendments. Docket No. 5. He filed a motion for preliminary injunction that same date. Docket No. 6.

On December 18, 2007, after the convening of a three-judge court, the district court ordered that "[u]pon consideration of the Motion for Preliminary Injunction, . . . [o]ral argument on the motion is set for January 15, 2008 at 10:00 a.m. . . ." Order, Appendix 19a. On January 10, 2008, the court ordered "that oral argument on the plaintiff's Motion for Preliminary Injunction set for January 15, 2008 at 10:00 A.M. is rescheduled for January 15, 2008 at 9:00 A.M. (CST)." Order, Appendix 21a (emphasis omitted).

The district court heard oral argument as scheduled on January 15, 2008. Then, on January 22, 2008, the three-judge federal court entered judgment against Governor Riley. *See* Judgment, Appendix 12a. On the plaintiff's motion to amend, Appendix 22a, and Governor Riley's response, Appendix 24a, the court filed an amended judgment on January 25, 2008, Appendix 16a, to clarify its intentions. The court held that the Governor's appointment, made pursuant to the Alabama Supreme Court decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, was a change that could not be enforced unless precleared. The court ordered that the Governor's appointment would be vacated in 90 days "without further order of th[e] Court" if the Governor had not obtained preclearance by that time. Alternatively, if Governor Riley immediately appealed, the appointment would be vacated on

February 5, 2008. *See* Order, Appendix 14a; Amended Judgment, Appendix 16a.

Governor Riley gave notice that while he disagreed with the district court's ruling that § 5 requires preclearance of his appointment, he intended to request such preclearance. *See* Notice, Appendix 31a. The State made a submission to USDOJ by letter dated March 18, 2008. *See* Notice, Appendix 34a. USDOJ has requested more information and the submission remains pending.

On March 22, 2008, Governor Riley filed his notice of appeal of the three-judge district court's final judgment. Appendix 37a. He filed a second notice of appeal on May 20, 2008. Appendix 72a.

After the district court ruled, Jefferson County voters filed a state court action concerning the validity of the special election under state law, an issue that the district court appropriately declined to decide. They sought to stop the special election that was scheduled for February 5, 2008. The Circuit Court declined to enter emergency injunctive relief and the election was held. The plaintiffs appealed and the Alabama Supreme Court entered an order enjoining local officials from declaring the results of the special election and remanding the case to the Circuit Court for a decision on the merits. Governor Riley intervened. The Circuit Court ruled that, in spite of the clear decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, the Jefferson County local law was valid and the election was, therefore, valid as a matter of state law. Governor Riley and aligned parties immediately appealed to the Alabama Supreme Court. Briefing is complete and the parties have been notified that oral argument will be set for June 4, 2008. *Riley, et al. v. Jefferson County*

Election Comm'n, et al., Alabama Supreme Court Nos. 1070850, 1070893, 1070917.[8]

B. Statement of Facts.

In 1977, the Alabama Legislature passed Act No. 77-784 which, like the Mobile County local law, discussed above, provided that vacancies on the Jefferson County Commission be filled by special election. While Act No. 77-784 was not the specific subject of the Alabama Supreme Court decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, the Jefferson County local law is indistinguishable in all relevant respects from the Mobile County local law, and logically the two are equally unconstitutional. Under *Stokes v. Noonan*, Act No. 77-784 violates § 105 of the Alabama Constitution. Under *Riley v. Kennedy*, it is not given effect by subsequently-passed amendments to the general law.

Two vacancies arose on the Jefferson County Commission in 1982, before *Stokes v. Noonan* was decided, and those vacancies were filled by special election pursuant to the local law. *See* Memorandum Opinion at Appendix 3a. The next vacancy known to arise on the Jefferson County Commission occurred in 2001, after *Stokes v. Noonan* but before the 2004

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[8] If the Alabama Supreme Court rules consistently with its prior opinions in *Stokes v. Noonan* and *Riley v. Kennedy*, then the Governor's appointment was valid as a matter of state law, leaving its validity under § 5 to be decided. If the Alabama Supreme Court rules for some reason specific to this case that the Jefferson County local law (unlike the Mobile County law invalidated in *Stokes v. Noonan*) does *not* violate the Alabama Constitution, then the Governor's appointment was invalid under *state* law, and the plaintiff's federal claims would likely be moot.

amendment to the general law. That vacancy was filled by gubernatorial appointment, without any challenge from any party on § 5 (or any other) grounds. *See id.*; Stipulations, Docket No. 19 at ¶ 5.

In October 2007, Jefferson County Commissioner Larry Langford, an African-American, was declared the winner in an election for the office of Mayor of the City of Birmingham. He resigned his seat on the Commission on November 13, 2007. *See* Memorandum Opinion at Appendix 4a.

On October 29, 2007—after the mayoral election and before Langford's resignation—the Jefferson County Election Commission (the local body with authority to call special elections pursuant to Act No. 77-784) passed a resolution calling for a special election on February 5, 2008, "in the event of" a vacancy. *See id.* Plaintiff filed this action on November 16, 2007. *See* Complaint, Docket No. 1.

On November 21, 2007, Governor Riley appointed General George F. Bowman to the seat vacated by Mayor Langford. Stipulations, Docket No. 19 at ¶ 19. Commissioner Bowman, an African-American, is a retired two-star army general and the son of a Tuskegee airman. *Id.* at ¶ 20.

The district court held a hearing on plaintiff's motion for preliminary injunction on January 15, 2008, and entered judgment on January 22, 2008. The district court found that the Governor's appointment was a "change" for purposes of § 5 and must be precleared to be enforceable. *See* Memorandum Opinion, Appendix 1a; Amended Judgment, Appendix 16a.

After entry of judgment, the special election was held on February 5, 2008, but the Alabama Supreme

Court enjoined local officials from announcing the results. (Commissioner Bowman participated in that election, and according to unofficial returns did not receive the most votes.) The appeal of the state court litigation is pending.

ARGUMENT

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, precludes a covered jurisdiction from enforcing a standard, practice, or procedure that affects voting – *if* it is different from the standard, practice, or procedure in force or effect on the coverage date (in Alabama's case, November 1, 1964) – unless the Attorney General of the United States declines to object to the change, or unless a three-judge federal district court sitting in the United States District Court for the District of Columbia declares that the change has neither the purpose nor the effect of discriminating on the basis of race. 42 U.S.C. § 1973c, Appendix 41a.

This case presents the question of whether a "change" to a voting practice must be precleared when it is mandated by two decisions of the Alabama Supreme Court that deprived the relevant precleared state Act of operative effect.

This case also presents an important question concerning the intersection of federal and state law that highlights the constitutional tensions inherent in § 5. Before a state statute that affects voting can be enforced, it must be both valid as a matter of state law *and* precleared. Otherwise, if a subsequent practice is not precleared, the covered jurisdiction will be forced to keep in place a practice that has no basis in state law. As a result of the interpretation of § 5 by the three-judge district court, assuming the

Governor's appointment is not precleared, Alabama will be compelled to give effect to a special election conducted pursuant to a state statute that is unconstitutional.

In addition, this case presents the question of whether the implementation of a voting practice that was in force or effect on the relevant coverage date, here November 1, 1964, is subject to the preclearance requirements of § 5.

Finally, the case presents an issue of the application of the Federal Rules of Civil Procedure. The district ordered briefing and hearing on the plaintiff's motion for preliminary injunction. Appendix 19a, 21a. After that hearing, and without giving the notice required by Fed.R.Civ.P. 65(a)(2), the district court skipped to the merits and entered judgment against Governor Riley. Judgment, Appendix 12a; Amended Judgment, Appendix 16a.

This appeal is similar to that in *Riley v. Kennedy*, No. 07-77, and Governor Riley adopts his arguments from that case.

I. A decision by a covered jurisdiction's highest court that a precleared state law is unconstitutional and, thereby, invalid as a matter of state law is not a change that requires preclearance.

The Governor's appointment of Commissioner Bowman is not subject to § 5 for several reasons, many of which were discussed at length in *Riley v. Kennedy*, No. 07-77. Those arguments are summarized in this Section I and in Section II, below.

A. Text. The *text* of § 5 does not reach changes required by the type of court decisions at issue here, where the court is merely conducting a wholly *Marbury* interpretation of a statute and a state constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[9] The text applies only to practices different from those in force or effect on the coverage date, says nothing at all of court decisions, and expressly provides that preclearance does not "bar a subsequent action to enjoin enforcement of" a precleared practice. Thus, a statute or practice "'*that satisfies § 5* still may be enjoined as unconstitutional.'" *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 339 (2000) (quoting *Shaw v. Reno*, 509 U.S. 630 (1993)) (emphasis added in *Reno*).

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[9] One difference between *Kennedy* and this case – but one that ultimately does not matter – is that in *Kennedy*, the district court expressly required preclearance of the Alabama Supreme Court decisions. *Kennedy v. Riley*, 445 F.Supp. 2d 1333 (M.D. Ala. 2006) (three-judge court). Here, the district court required preclearance of the Governor's appointment made pursuant to those decisions. *Plump v. Riley*, ___ F.Supp.2d ___, 2008 WL 192826 (M.D. Ala. Jan. 22, 2008) (Three-judge court), reprinted at Appendix 1a. That distinction, which is really one of semantics, does not change the fact that the practice is the result of a court decision that simply interpreted the State Constitution on race-neutral grounds having nothing to do with voting, and not the policy choice of the legislative or executive branches. Nor does the "difference" lessen the federalism costs of the district court's decision, discussed below. Whether it is the state court decisions themselves that must be precleared or the appointment made pursuant to those decisions, the practical effect is that a decision of the state's highest court, interpreting the state's constitution, is ineffective unless blessed by the federal government.

B. Legislative History. Nor does the purpose or legislative history of § 5 require a holding that § 5 reaches interpretive court decisions. Section 5 was enacted to freeze voting practices and to stop the "cat and mouse" game played by legislators and executives, where they passed new discriminatory laws as soon as the old ones were struck down.[10] There is no similar indication that Congress was targeting interpretative judicial decisions. Of course, there may be some court judgments that fairly should be characterized as legislative acts – redistricting, for example – and those decisions arguably should come under the § 5 umbrella. However, a court normally is not capable of the agile gamesmanship targeted by § 5, and was not in this case.

C. Supreme Court Precedent. This Court's decisions are not to the contrary. In *Kennedy*, the Appellees cited *Branch v. Smith*, 538 U.S. 254 (2003), and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), for the argument that § 5 reaches all changes required by court decisions. That is not what those cases stand for.

Branch involved a Mississippi chancery court decree reapportioning congressional districts. 538 U.S. 259-60. Drawing districts is a legislative act and is hardly the bread and butter of a judge's work. It certainly is not like the court decisions at issue here, which merely interpreted a statute and a provision of the state constitution on neutral, non-racial terms. At most, *Branch* stands for the

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[10] *See e.g. South Carolina v. Katzenbach*, 383 U.S. 301, 313-14, 335 (1966); *Beer v. United States*, 425 U.S. 130, 140 (1976); H.R. Rep. No. 94-196, at 57-58 (1975); 111 Cong. Rec. 10,727 (1965) (Sen. Tydings).

proposition that *some* practices required by court decisions are subject to § 5. Governor Riley does not argue with that proposition here.

Hathorn involved a 1964 Mississippi election statute that, as a result of doubts about its constitutionality, had never been enforced. 457 U.S. 257-58. The Mississippi Supreme Court ordered compliance with a voting practice that predated the coverage date, *id.* at 259-61, but that was not "in force or effect" on November 1, 1964. Because it had never been enforced, the voting practice was not a baseline practice. That is very different from this case, where the practice at issue *was* in force or effect on the coverage date.

D. An Unconstitutional Statute Cannot Serve as the Baseline. In concluding that the Governor's appointment – made pursuant to *Stokes v. Noonan* and *Riley v. Kennedy* – required preclearance, the three-judge court essentially held that the validity of a state law is irrelevant and that Alabama must continue to enforce a statute that is unconstitutional. That conclusion is offensive to federalism and is inconsistent with this Court's decision in *Abrams v. Johnson*, 521 U.S. 74 (1997). *Abrams* demonstrates that both validity and enforceability are required.

In the post-1990 redistricting cycle, the Georgia Legislature passed two redistricting plans that were not precleared and a third that was held to be the product of an unconstitutional racial gerrymander in *Miller v. Johnson*, 515 U.S. 900 (1995). Ultimately, the federal courts drew a plan, and this Court considered a variety of challenges to that remedial plan, including a Section 5 challenge, in *Abrams*. With respect to that Section 5 challenge, this Court said that that the unconstitutional plan,

"constitutional defects and all," could not be the benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." 521 U.S. at 97. Indeed, it could not be used as the benchmark even though elections had been conducted under it.

The Alabama Supreme Court's declaration in *Stokes v. Noonan* (that local laws such as Act No. 77-784 are unconstitutional) operates just like this Court's decision in *Miller v. Johnson*. Under Alabama law, acts that have been declared unconstitutional are void *ab initio*. *Ex parte Southern Railway*, 556 So. 2d 1082, 1089-90 (Ala. 1989). Allowing the preclearance of Act No 77-784 to freeze it in place (if the new practice is not precleared) forces the State to follow an unconstitutional law. And, the fact that an election was conducted under it should have no more effect than the legislative elections in Georgia conducted under the unconstitutional plan.

Perkins v. Matthews, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), are not to the contrary. Those decisions, at least at first blush, appear to hold that a practice that violates state law can nonetheless serve as a baseline. However, the key question in both decisions was what voting practices were "in force or effect" on the applicable *coverage date*. In *Perkins*, the city of Canton, Mississippi had elected aldermen by wards, despite an existing statute requiring at-large voting. 400 U.S. at 394-95. In *Lockhart*, the City of Lockhart, Texas had used numbered posts to elect commissioners despite uncertainty about its authority under state law to do so. 460 U.S. at 132-33. The question was whether the coverage date

practice, although arguably illegal, was nonetheless part of the baseline. This Court applied the text of § 5 and held that so long as the practice was actually "in force or effect on" the applicable coverage date – *i.e.*, so long as it was actually being used on that date – then it fixed the statutory baseline and the jurisdiction could not change it without preclearance. *See Lockhart*, 460 U.S. at 132-33; *Perkins*, 400 U.S. at 394-95. That is a far cry from holding that an unconstitutional state practice that was *not* in force or effect on the coverage date can become the new baseline even if that practice violates the state constitution.

The holdings of *Perkins* and *Lockhart* square with the text of § 5, because those cases dealt with coverage-date practices. The holdings also make sense in historical context. Congress had reason to freeze the legal landscape as of the coverage date, including arguably illegal practices, when its goal was to stop a moving target. That logic does not bear out here, where the illegal practice (special elections) was not enacted until long after the coverage date.

Moreover, neither *Perkins* nor *Lockhart* includes an element present in this case: an authoritative determination of state law. The *Lockhart* Court emphasized that the lawfulness of the numbered-post practice at issue in that decision was "not entirely clear" and that, in fact, "[t]here did not appear to be any Texas case law on the subject." *Lockhart*, 460 U.S. at 132 & n.6. In *Perkins*, the legality of the coverage-date practice may not have been as uncertain as in *Lockhart*, but still there was nothing so clear as *Stokes v. Noonan* declaring the practice illegal. Certainly that case did not require, as the district court's interpretation here, "state

courts [to] live with the insult that their judgments can be revised by a federal agency." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting).[11]

II. The district court's conclusion that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* require preclearance raises serious constitutional and workability concerns.

As noted above, the three-judge federal district court applied the test in *City of Lockhart*, and did not address the constitutional and workability problems its ruling creates. With its refusal to preclear *Stokes v. Noonan* and *Riley v. Kennedy* in the federal *Kennedy* litigation, USDOJ forced Alabama to keep in place a state statute the violates Alabama's constitution. Assuming USDOJ will make the same

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[11] In *Kennedy*, Governor Riley cited *Young v. Fordice*, 520 U.S. 273 (1997), where this Court held that a plan was not the baseline when it was used for only a short period of time with the anticipation that the Legislature would adopt it, and its use was abandoned "as soon as its unlawfulness became apparent." *Id.* at 283. That argument, Governor Riley has contended, should control in the *Kennedy* context, where the practice of special elections was used briefly in Mobile County solely as a result of the vagaries of the litigation process. Here, the local law was passed in 1977, used briefly in 1982 to fill two back-to-back vacancies, and abandoned at the next vacancy in 2001, the first vacancy after the unlawfulness of the 1977 local law became apparent (with the 1988 *Stokes v. Noonan* decision). Due to the passage of time, *Young* may not have the same force here that it has in *Kennedy*. Still, the Jefferson County election practice was used only briefly and was abandoned at the first opportunity once its unlawfulness became apparent.

decision here and refuse to preclear the Governor's appointment, the result is the same.

As this Court has held, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)); see also *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress lacks power to condition statehood on specific location of state capital). If Congress cannot tell a state what its law is, neither can USDOJ.

As to workability, in the ordinary course of the State's business, it reviews and submits legislation affecting voting for preclearance as soon as it can. The district court's interpretation of § 5 suggests that state officials should not seek preclearance of legislation before its constitutionality is tested, or else an unconstitutional practice may be frozen in place. Practically, though, that is not a reasonable option. The submission and preclearance 60 days later can be completed well before litigation challenging the constitutionality of the legislation in question can be concluded, or even initiated. Moreover, a lawsuit testing the constitutionality of a statute may not be ripe before the preclearance process is completed.

Finally, the State notes that it has done nothing that would merit an interpretation that increases the federalism costs and workability concerns of § 5. There is no evidence that gubernatorial appointments are being used in a discriminatory manner. When the Supreme Court of Alabama declared local Act No. 85-237 unconstitutional in

1988, then-Governor Guy Hunt, a white Republican, appointed Mr. Sam Jones, the African-American who had won the special election, to fill the vacancy on the Mobile County election. When the Supreme Court of Alabama held that Act No. 2004-455 did not revive local Act No. 85-237, Governor Riley, a white Republican, appointed Mr. Juan Chastang, an African-American, to fill the vacancy. And on the Jefferson County vacancy, Governor Riley appointed General George F. Bowman, also an African American.

As this Court has recognized, § 5's preclearance mechanism is "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). The district court's interpretation of § 5 in this case (and in *Kennedy*) greatly exacerbates that federalism cost by requiring the state to keep in place an unconstitutional statute, by precluding enforcement of an interpretation of the state constitution by the state Supreme Court, and by encouraging states not to seek preclearance of a practice (and thus freeze it into place) until the constitutionality of that practice has been tested. An interpretation that magnifies the already-high federalism costs of § 5 should not be allowed without a clear statement from Congress. *See Raygor v. Regents of the Univ. of Minn.* 534 U.S. 533, 543-44 (2002). Section 5 does not contain a clear statement that *Marbury*-style court decisions or post-coverage date practices are subject to § 5, or

that an unconstitutional state law can be frozen into place.[12]

III. The practice of gubernatorial appointment is not subject to § 5's preclearance requirement because it was the State's practice on Alabama's § 5 coverage date of November 1, 1964.

By the clearest of terms, § 5 applies only to voting practices that are different from those in effect on a covered jurisdiction's coverage date, which in Alabama's case is November 1, 1964:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting *different from that in force or effect on November 1, 1964*, ... [such practice is unenforceable unless precleared.]

42 U.S.C. § 1973c(a) (emphasis added).

Here, the practice of filling vacancies on the Jefferson County Commission on November 1, 1964 was gubernatorial appointment. *See* Code of Alabama (1940), T. 12, § 6. The practice the Governor seeks to enforce today – and which under

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[12] As in *Riley v. Kennedy*, No. 07-77, Governor Riley does not argue that § 5 is unconstitutional. He only asks this Court to be cognizant of the constitutional limitations upon that statute as it answers the interpretative question presented in this appeal.

state law he must enforce – is likewise gubernatorial appointment. Thus, the text of § 5 does not reach the appointment at all.

As clear as the text is, USDOJ has nonetheless interpreted § 5 to apply as a one-way ratchet, meaning each new practice must be compared to the preceding practice, even if the preceding practice was enacted after the coverage date. A Department regulation states that "[a]ny change affecting voting, even though it . . . returns to a prior practice or procedure, . . . must meet the Section 5 preclearance requirement." 28 C.F.R. § 51.12. Language in the Federal Register indicates that § 51.12 was intended to clarify that § 5 covers a "voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964)." 52 Fed. Reg. 486, 488 (1987).

The Department's interpretation of the Voting Rights Act is due deference. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985). However,

> the principle has its limits. Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.

Presley v. Etowah County Comm'n, 502 U.S. 491, 508 (1992). Here, Congress could not have been clearer in expressing its intent. In fact, it is difficult to imagine anything less ambiguous than a single date in time. Therefore the regulation is counter to the text and is not due deference.

This Court has twice suggested, in dicta, that § 5 picks up intervening changes as the baseline practice. In *Presley*, 502 U.S. 491, this Court considered whether a change in the powers of an elected office was a change with respect to voting, and concluded that it was not. *Id.* at 509. While summarizing the requirements of § 5, this Court said as follows:

> To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.

502 U.S. at 495. That was not the *holding* of *Presley*, nor was the issue of choosing a baseline practice before the Court. The district court nonetheless cited this language from *Presley*. Memorandum Opinion at Appendix 5a n.1.

The *Presley* language was repeated in *Young v. Fordice*, 520 U.S. 273, 281-282 (1997), in which this Court determined that a practice from the 1990's was the baseline practice. However, this Court noted that "none of the parties asks us to look further back in time than 1994 . . . ." *Id.* at 282. Again, the "intervening changes" language is *dicta*, and the Court was not asked in *Young* to decide whether post-coverage-date changes can become the baseline. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545-46 (2005) (the repetition of a formula in *dicta*, and that merely assumes the formula's validity, is not entitled to the weight of *stare decisis*).

This straight-forward reading of the statute (that it covers only practices different from those in effect on the coverage date) is consistent with the purpose of § 5. Section 5 was Congress' targeted "response to [the] common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976). Its purpose was to freeze voting practices in covered jurisdictions at a date in time to prevent a "cat and mouse" game. 111 Cong. Rec. 10,727 (1965) (Sen. Tydings).

It makes sense, then, that Congress required preclearance of any practice different than the one in place on a date certain, not any practice different than the one before. The goal of § 5 was not to require covered jurisdictions to pass continually progressive laws, however noble a goal that may be. The goal was to call a "time out" and to stop the gamesmanship. To call that "time out," Congress chose a specific date, and has continued to use that same date in subsequent extensions of § 5.[13]

This reading is consistent, too, with the Act's coverage criteria: Pursuant to 42 U.S.C. § 1973b(b), a jurisdiction is covered if it met certain criteria of being discriminatory *on the coverage date*. That was true in the original enactment and every subsequent

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[13] Section 5 was originally effective for five years, and was extended in 1970 for 5 years, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315; in 1975 for 7 years, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400; in 1982 for 25 years, Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 131, 133; and in 2006 for another 25 years, Pub. L. No. 109-245, § 7, 120 Stat. 577, 581. Each reenactment continues to use the same dates for both coverage criteria and the baseline practice.

extension of § 5. Thus, to decide whether Alabama was covered by the 2006 extension, one looks back to November 1, 1964. Likewise, to decide whether a practice must be precleared, one compares it to the practice in effect on that same date.

This reading of the statute would *not* remove all checks against discriminatory practices. Returning to a coverage-date practice is hardly a typical scenario, but if it happens, and if that practice discriminated against minority voters, it would remain subject to § 2 of the Voting Rights Act and other statutory and constitutional voting rights protections.

No one could dispute that if Alabama continued to maintain the precise set of voting practices in place on November 1, 1964, no matter how flawed they may be, then § 5 would never come into play. Any of those practices would, however, be subject to § 2. It is evident, then, that § 5 is not about the substance of the law (that is the job of § 2). It is not about a forced evolution of the law. Section 5, instead, is about stopping quick changes, and Congress did so by picking a single day in history to serve as the benchmark.

The district court therefore should not have compared the practice of gubernatorial appointment to a practice enacted in 1977. Instead, the district court should have compared the current practice of gubernatorial appointment with the November 1, 1964 practice – also gubernatorial appointment – and concluded that there was no "change" requiring preclearance.

Even if this Court does not use this occasion to decide whether intervening changes can become the

§ 5 baseline, this textual analysis supports the Governor's previous arguments, discussed above in Sections I and II, that a practice mandated by state court decisions, where the state court is merely exercising *Marbury*-style review, is not subject to § 5. The interpretation adopted by the district court here (and in *Kennedy v. Riley*) so exacerbates the federalism costs already inherent in § 5, it should not be adopted unless there is a clear statement in the text that the statute reaches such practices. This discussion shows that the text cannot provide that clear indication with respect to *Stokes v. Noonan* and *Riley v. Kennedy*, which reaffirmed the practice (gubernatorial appointment) in place "on November 1, 1964." Nor does it provide such a clear indication with respect to an appointment required by those decisions.[14]

IV. The district court erred by entering final judgment after briefing and oral argument on a motion for preliminary injunction and without giving notice required by Fed.R.Civ.P. 65(a)(2).

At the time the district court entered its judgment, all that was before it was a motion for preliminary injunction. The hearing notices referenced that fact, *see* Appendix 19a, 21a, and the district court never indicated that it intended to jump to the merits. The district court thereby denied Governor Riley the opportunity to argue the standards that apply to a hearing on the merits.

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[14] *See Riley v. Kennedy*, No. 07-77, Bl. Br. 26-27; Yellow Br. 7-8.

This Court has noted the many differences between a hearing on a preliminary injunction and one on the merits:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. In light of these considerations, *it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.*
>
> Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." *Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the hearing and the trial] either before the hearing commences or at a time which will still afford*

> *the parties a full opportunity to present their respective cases."*

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (emphasis added; citations omitted).

The lack of notice matters here, as Governor Riley briefed and argued the standards applicable to a motion for preliminary injunction. Moreover, to the extent factual questions concerning the implementation of the local act are relevant, those questions were still under investigation when the district court entered its judgment. For instance, in this case it was not known until the hearing before the district court that there had been special elections in 1982 under Act No. 77-784. Moreover, it was not known until *after* the district court's judgment that those special elections were not specifically precleared.[15]

Pursuant to Rule 65(a)(2), Governor Riley was entitled to notice of what questions the district court would consider and what standards would apply. Granted, if this Court decides the substantive § 5 questions in Governor Riley's favor, then the notice question need not be reached. If it is reached, then

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[15] The fact that the two special elections were not specifically precleared was included in the record of the state court litigation (which began after the district court issued its judgment), but does not appear in the record in this case. It is discussed here only to demonstrate that the facts were not fully known at the time that the district court skipped to the merits, and this fact is among those that the Governor would have investigated further had the proceedings not been abbreviated without notice. As best we can tell at this time, at least one of the 1982 special elections was held on a discretionary date and should have been precleared.

the judgment of the district court is due to be reversed on this ground.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's judgment and remand the case with instructions to declare that neither the Alabama Supreme Court decisions at issue, nor a gubernatorial appointment made pursuant to those decisions, must be precleared. Should this Court rule in *Riley v. Kennedy* before this case is decided, and if it is on grounds that apply to this case, it may be appropriate to vacate and remand with instructions to reconsider this case in light of that decision.

Respectfully submitted,

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May 21, 2008

Appendix

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
v.	)	2:07cv1014-MEF
	)	(WO)
HONORABLE BOB	)	
RILEY, as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

MEMORANDUM OPINION

Per curiam:

I. FACTS AND PROCEDURAL HISTORY

This three-judge court has been convened to consider the claim of Fred L. Plump that, under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, the State of Alabama was required, but failed, to preclear Defendant Governor Bob Riley's authority to appoint a person to a vacancy on the Jefferson County Commission. The Plaintiff has asked the court to enter a declaratory judgment that Defendant Governor Riley's authority to appoint a

person to fill a vacancy on the Jefferson County Commission must be precleared. The Plaintiff has further asked the court to enjoin the appointment by the Defendant of General George F. Bowman to the Jefferson County Commission, and to enjoin the Defendant from interfering with the election to fill the vacancy in the District 1 seat on the Jefferson County Commission which is scheduled for February 5, 2008. For the reasons to be discussed below, we find that the Plaintiff is entitled to only declaratory relief.

This case is being decided against the backdrop of a similar case arising out of a different county in Alabama. In *Kennedy v. Riley,* 2:05cv1100-MHT (M.D. Ala.) (three-judge court), a separate three-judge court recently was asked to vacate the gubernatorial appointment of a person to a vacancy on the Mobile County Commission. The three-judge court in that case granted the plaintiffs' requested relief, finding that the appointment had been made pursuant to decisions by the Alabama Supreme Court which constituted changes in procedure which had not been precleared and, therefore, violated the Voting Rights Act. *See Kennedy v. Riley,* 445 F. Supp. 2d 1333 (M.D. Ala. 2006) (three-judge court).

The facts of the instant case are substantially similar to those of the *Kennedy* case. The beginning point in both cases is an Alabama statute of general application which provides that a vacancy in a county commission shall be filled by appointment by the Governor. *See Alabama Code* § 11-3-6. Subsequent to the passage of that statute, local laws were passed by the Alabama legislature and precleared by the U.S. Attorney General which provided that in certain circumstances special

elections would be held to fill vacancies on the county commissions in both Mobile and Jefferson County. In Jefferson County, that Act was No. 77-784, while in Mobile County, it was Act No. 85-237.

At the evidentiary hearing held in this case on January 15, 2008, the Plaintiff adequately established that in 1982 two vacancies on the Jefferson County Commission were filled by special election pursuant to the selection process outlined in Act No. 77-784. Similarly, an election was held in 1987 pursuant to Act No. 85-237 to fill a vacancy on the Mobile County Commission.

In *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), the Alabama Supreme Court held that, because Act No. 85-237, which applied in Mobile County, was a local statute and because it conflicted with and was subsumed by another state law of general application, it violated the Alabama Constitution. The State did not submit *Stokes* for preclearance.

In 2001, a vacancy on the Jefferson County Commission was filled by appointment by then-Governor Siegelman rather than by special election, presumably because of *Stokes*.

In 2004, the Alabama Legislature passed Act No. 2004-455, amending Ala. Code § 11-3-6 expressly to allow local laws to make exceptions to the general rule of filling vacancies by gubernatorial appointments. The U.S. Attorney General precleared Act No. 2004-455.

In *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), the Alabama Supreme Court rejected claims that Act No. 2004-455 revived Act No. 85-237 and held that Act No. 2004-455 applied only prospectively. Relying

on *Riley* and *Stokes*, the Governor made an appointment to the vacated position on the Mobile County Commission. As with *Stokes*, the State did not submit *Riley* for preclearance.

A group of plaintiffs then filed a lawsuit in federal court claiming that the appointment by the Governor pursuant to *Riley* and the earlier decision in *Stokes* could not be enforced without first being precleared. The three-judge court agreed. *Kennedy*, 445 F. Supp. 2d at 1334.

In November 2006, the Governor submitted the *Stokes* and *Riley* decisions for preclearance, but the U.S. Attorney General did not preclear the decisions. The three-judge court case, *Kennedy*, was appealed to the U.S. Supreme Court and is currently pending on appeal.

On October 29, 2007, following the election of County Commissioner Larry Langford as Mayor of the City of Birmingham, the Jefferson County Election Commission ordered a special election to be held on February 5, 2008 to fill the vacancy which would exist on the Commission upon the assumption by Commissioner Langford of the office of Mayor.

On November 13, 2007, the vacancy was created when Commissioner Langford assumed the office of Mayor. On November 16, 2007, the Plaintiff, who has qualified to run for the vacant office in the February 5, 2008 special election, filed the instant case. On November 21, 2007, Governor Riley appointed General Bowman to fill the vacancy on the Jefferson County Commission.

II. DISCUSSION

A. Plaintiff's Request for Declaratory Judgment

The Plaintiff urges this court to conclude, based largely on *Kennedy*, that Defendant Governor Riley's power to appoint persons to fill vacancies on the Jefferson County Commission is a change in procedure which has not been precleared.

Section 5 of the Voting Rights Act provides that a covered jurisdiction, such as Alabama, "may not implement any change in a voting 'qualification, prerequisite, standard, practice, or procedure' unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting 42 U.S.C. § 1973c).

In determining § 5 issues, a court must consider (i) whether there are voting qualifications, prerequisites, standards, practices, or procedures that are different from "those in existence before they were adopted," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992)-that is, whether a change was covered by § 5,[1] (ii) if the change was

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1. The court in *Presley* explained this inquiry to mean that it is only "[a]bsent relevant intervening changes, [that] the Act requires" comparison with practices in existence on November 1, 1964. *Presley*, 502 U.S. at 495; *see also Lake v. State Bd. of Elections of N. C.*, 798 F. Supp. 1199, 1205 (M.D. N.C. 1992) (three-judge court); *Villegas v. Dallas Indep. Sch. Dist.*, No. 30cv858R, 2003 WL 22573921, at *5 & n. 9 (N.D. Tex. Oct. 17, 2003) (citing *Presley* and stating the inquiry is whether the practice is "different from the one in force on the date § 5 took effect or (if applicable) different from the one that earlier received preclearance?"); *cf. NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980) (three-judge

covered, whether § 5's approval requirements are satisfied, and (iii) if the requirements are not satisfied, what remedy is appropriate. *City of Lockhart v. United States*, 460 U.S. 125, 129 n. 3 (1983).

As stated above, the three-judge court in *Kennedy* reasoned that because Act No. 85-237, which provided for special elections in Mobile County, established a precleared practice which was put into force and effect with the holding of a special election in 1987, it was the baseline to use in determining whether gubernatorial appointment was a change requiring preclearance. *Kennedy*, 445 F. Supp. 2d at 1336. Because *Stokes* invalidated Act No. 85-237 and the *Riley* court refused to revive Act No. 85-237, the two decisions constituted changes in existing, precleared practice or procedure with respect to voting that should have been precleared before they were implemented. *Id.*

We are persuaded to follow the reasoning of *Kennedy* in this case. Of course, this case is not identical to *Kennedy*. In particular, the Plaintiff does not concede that *Stokes* invalidated Act No. 77-784, which applies only to Jefferson County, since *Stokes* was decided with respect to a Mobile County local law. That is a question of purely state law not before this court. We are required to determine the baseline "without regard for [its] legality under state law."

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court) (rejecting interpretation of Voting Rights Act where "a covered state or subdivision thereof could amend its laws concerning voting and receive the Attorney General's approval, then change its laws back to the way they were before, avoiding federal preclearance...").

Lockhart, 460 U.S. at 132-33 (relying on *Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971)).[2]

The practice of special election in Jefferson County was established by Act No. 77-784 and was precleared. That practice was used, or put into force and effect, when special elections were held pursuant to that Act in 1982.[3] The gubernatorial appointment power exercised thereafter was, therefore, a change in practice covered under the Voting Rights Act which must be precleared.

The court emphasizes that whether Act No. 77-784 is, in fact, unconstitutional under state law, and whether positions on the Jefferson County Commission must be filled by special election or

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2. In *Kennedy*, the claim was raised that the *Stokes* and *Riley* decisions had to be precleared. Of course, the Alabama Supreme Court does not have to preclear any of its interpretations of state law; it is the final word on what state law is. It was rather the power of gubernatorial appointment which was exercised in good faith by the Defendant and which was authorized by state law which had to be precleared for purposes of the Voting Rights Act because it constituted a change in practice under federal law. In this case, as in *Kennedy*, it is the practice of gubernatorial appointment which has been challenged as constituting a change from the precleared practice of special election to fill vacancies.

3. The court does not agree with the characterization by the Defendant of this practice having been abandoned within the meaning of *Young v. Fordice*, 520 U.S. 273 (1997). In *Young*, the Court reasoned that the state officials abandoned the state law practice just as soon as it became clear that it would not be enacted by the state legislature, and the practice was only in effect for a short period of time. *See Young*, 520 U.S. at 282-83. Here, the practice of special election was enacted in 1977, used in 1982, and, assuming arguably that it was invalidated, not invalidated until 1988.

gubernatorial appointment under state law, are questions we do not reach and this opinion should not be understood in any way as reaching. We conclude only that the authority of the Governor to appoint persons to fill vacancies on the Jefferson County Commission is a change in practice which must be precleared, and that the Plaintiff is entitled to declaratory relief to that effect.[4]

B. Plaintiff's Request for a Preliminary Injunction

This court acknowledges that, generally speaking, if changes in voting practice subject to § 5 have not been precleared, a plaintiff is entitled to an injunction prohibiting the implementation of those changed practices. *Clark v. Roemer,* 500 U.S. 646, 653 (1991). In this case, however, the change has already been implemented, so enjoining the Defendant from making the appointment is not an appropriate form of relief. Similarly, although the Plaintiff asks this court to enjoin the Defendant from interfering with the election to be held on February 5, 2008, the determination by this court that the exercise of gubernatorial appointment power is a change which must be precleared under the Voting Rights Act does not give this court authority to prevent the Defendant from challenging, on state law

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4. In the Amended Complaint the Plaintiff also seeks a declaratory judgment that the Election Commission of Jefferson County has the authority to call a special election for District 1 of the Jefferson County Commission. That determination is outside of the province of this three-judge court. There is no claim before the court to determine the status of any authority pursuant to which such election might be held for purposes of the Voting Rights Act, and the validity of such an election under state law is not before this court.

grounds, the validity of the election. Therefore, this court concludes that the Plaintiff's requested preliminary and permanent injunctions are due to be denied.

C. Form of Relief

The next remedial issue before the court, therefore, is whether this court should order the seat on the Jefferson County Commission vacated at this time, or whether the court should give the Defendant the opportunity to seek preclearance of the gubernatorial appointment power. As noted above, this case involves a situation where the changed practice has already been implemented. The Supreme Court has determined that where a practice has already been implemented, it might be appropriate for a district court "to afford local officials an opportunity to seek federal approval before" ordering relief. *Lopez v. Monterey County, Cal.*, 519 U.S. 9, 20-21 (1996) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971); *Berry v. Doles*, 438 U.S. 190 (1978) (per curiam)). Under that authority, this court determines that the proper course of action is for this court to allow the Defendant time in which to either (1) seek preclearance under the Voting Rights Act of the authority of the Defendant to fill a vacancy on the Jefferson County Commission by appointment, or (2) advise the court that he intends to appeal this decision. Should preclearance not be obtained to validate the gubernatorial appointment of General George F. Bowman to the Jefferson County Commission, the necessity for preclearance dictates that the appointee must be removed, as he would be serving as a Commissioner of Jefferson County in violation of federal law.

This court being mindful that the substantially-similar *Kennedy* decision is currently pending before the U.S. Supreme Court, the court will enter final judgment in this case to allow for a prompt appeal, if that is desired, and for the possibility of consolidation on appeal of this case with *Kennedy*, should the U.S. Supreme Court wish to consider the two cases together.

Accordingly, it is hereby ORDERED as follows:

1. The Plaintiff's request for declaratory judgment is GRANTED and this court declares that Governor Riley's authority to appoint a person to fill a vacancy on the Jefferson County Commission must be precleared.

2. The Plaintiff's request for injunctive relief is DENIED.

___3. The Defendant is given until February 5, 2008 to file with the court a notice that he either intends to appeal or intends to seek preclearance. In the event that the Defendant does not notify the court on or before February 5, 2008 that he intends to seek preclearance, the seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court. If the Defendant notifies the court on or before February 5, 2008 that he intends to seek preclearance, he will be given a total of 90 days to obtain preclearance. If preclearance is not obtained from either the U.S. Attorney General or the U.S. District Court for the District of Columbia within 90 days, then the appointment of General George F. Bowman to the Jefferson County Commission shall be vacated without further order of this court.

An appropriate judgment will be entered.

Done this the 22nd day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07cv1014-MEF
	)	(WO)
HONORABLE BOB	)	
RILEY, as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

JUDGMENT

In accordance with the Memorandum Opinion entered this date, it is the FINAL JUDGMENT of the court that:

(1) Declaratory Judgment is entered in favor of the Plaintiff Fred L. Plump and against Defendant Governor Bob Riley.

(2) The Defendant has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. In the absence of such notification, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court.

b. If the Defendant chooses to seek preclearance, he shall so notify the court in writing on or before February 5, 2008. In that event, if preclearance is not obtained by 90 days from the date of this Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, 07-77, if the U.S. Supreme Court deems consolidation appropriate.

Done this the22nd day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07cv1014-MEF
	)	(WO)
	)	
HONORABLE BOB RILEY, as Governor of the State ofAlabama	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

ORDER

Upon consideration of the Plaintiff's Motion to Amend Judgment (Doc. #30), filed on January 23, 2008, and the Defendant's Response, filed on January 24, 2008, and in view of the apparent confusion over the intent of this court's original Judgment, the Motion is ORDERED GRANTED to the limited extent that the court clarifies its previous Judgment as follows:

The Jefferson County Commission seat currently occupied by General George F. Bowman will be vacated without further order of this court on

the following dates and under the following three contingencies:

1. If the Defendant chooses to appeal this court's January 22, 2008 Memorandum Opinion and Judgment, the Defendant shall notify the court on or before February 5, 2008 of that decision and the seat will be vacated on February 5, 2008 without further order of the court.

2. If the Defendant notifies the court on or before February 5, 2008 that he chooses to seek preclearance, then the seat will be vacated only if preclearance is not obtained by 90 days from the date of this court's January 22, 2008 Memorandum Opinion and Judgment.

3. If the Defendant fails to notify the court on or before February 5, 2008 of which action he chooses to take, the seat will be vacated on February 5, 2008.

All other provisions of the original Judgment shall remain unchanged.

An appropriate Amended Judgment will be entered.

DONE this 25th day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)
	)
Plaintiff,	)
	) CASE NO.
v.	) 2:07cv1014-MEF
	) (WO)
HONORABLE BOB	)
RILEY, as Governor of	)
the State ofAlabama,	)
	)
	)
Defendant.	)

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

AMENDED JUDGMENT

In accordance with the Memorandum Opinion entered on January 22, 2008, it is the FINAL JUDGMENT of the court that:

(1) Declaratory Judgment is entered in favor of the Plaintiff Fred L. Plump and against Defendant Governor Bob Riley.

(2) The Defendant has 90 days from the date of the original Judgment, January 22, 2008, to obtain preclearance in accordance with § 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. If the Defendant notifies the court on or before February 5, 2008 that he intends to appeal, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.

b. If the Defendant chooses to seek preclearance, he shall so notify the court in writing on or before February 5, 2008. In that event, if preclearance is not obtained by 90 days from the date of the original Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated 90 days from January 22, 2008 without further order of this court.

c. If the Defendant does not notify the court on or before February 5, 2008 which action he chooses to take, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, 07-77, if the U.S. Supreme Court deems consolidation appropriate.

Done this the 25th day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07-cv-01014-MEF
HONORABLE BOB,	)	
RILEY as Governor of	)	
The State of Alabama,	)	
	)	
Defendant.	)	

ORDER

Upon consideration of the Motion for Preliminary Injunction (Doc # 6), it is hereby ORDERED as follows:

(1) Oral argument on the motion is set for January 15, 2008, at 10:00 a.m., in Courtroom 2F of the United States Courthouse, One Church Street, Montgomery, Alabama 36104.

(2) Defendants shall submit a response on or before December 28, 2007.

(3) Plaintiffs shall submit a reply on or before January 4, 2008.

(4) The Parties shall submit all stipulations of law and fact and agreed statements of fact on or before January 4, 2008.

Done on this the 18th day of December, 2007.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07-cv-01014-MEF
HONORABLE BOB,	)	
RILEY as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

ORDER

It is hereby ORDERED that oral argument on the plaintiff's Motion for Preliminary Injunction set for January 15, 2008 at 10:00 A.M. is rescheduled for **January 15, 2008 at 9:00 A.M. (CST).**

DONE this the 10th day of January, 2008.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	2:07-cv-01014-MEF-CSC
	)	
HONORABLE BOB RILEY, as Governor of the State of Alabama	)	
	)	
Defendant.	)	

Plaintiff's Motion to Amend Judgment (Doc. 29)

1. The Judgment (Doc. 29) appears to differ from the Order portion of the Court's Memorandum Opinion (Doc. 28).

2. It appears that the Memorandum Opinion (Doc. 28, page 9) intended to extend General George F. Bowman's term beyond 5 February 2008 only if the defendant gave notice that he was seeking preclearance.

3. The Judgment states in paragraph (2)a, "If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. *In the absence of such notification*, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of

this court" (emphasis added).

4. Plaintiff understood the Memorandum opinion to vacate General Bowman's term if Governor Riley does *not* seek preclearance, but the highlighted words do the opposite.

5. For these reasons, the plaintiff prays that the Court amend Paragraph (2)a of its Judgment to read as follows

> a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. *If such notice is filed*, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on *February 5, 2008*, without further order of this court.

Submitted by,

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[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
	)	
BOB RILEY, Governor,	)	
	)	
Defendant.	)	

DEFENDANT GOVERNOR BOB RILEY'S RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND

Defendant, Governor Bob Riley, respectfully responds as follows to the Plaintiff's Motion to Alter Judgment (doc. 30):

1. As counsel for plaintiff has pointed out in a motion filed yesterday, there appears to be some inconsistency between this Court's opinion (Doc. 28) and judgment (Doc. 29) concerning General Bowman's right to remain in office pending the resolution of preclearance and/or appellate proceedings. While the parties agree that there is an apparent inconsistency in the opinion and judgment, the parties have vastly different understandings of what this Court intended with respect to General Bowman remaining in office. Governor Riley understood the Court's *judgment* (which has priority in any event) to accurately reflect the Court's

intention – namely, that General Bowman is entitled to remain in office pending the resolution of either preclearance or appellate proceedings. (Judgment at 2, ¶ (2)(a)). If this Court clarifies the documents, Governor Riley respectfully requests the Court to amend its opinion (Mem. Op. at 9, ¶ 3) to reflect that intent.

2. In addition to the issues raised in the Plaintiff's motion, there are other apparent inconsistencies or ambiguities in this Court's opinion and judgment. It is not clear at this time whether the Court in fact granted or denied the Plaintiff's request for injunctive relief or whether the judgment is one from which an appeal can be taken:

a) Although the Court's opinion and judgment indicate that the Court meant to dispose of the entire case, the Court's disposition of plaintiff's § 5 claim leaves pending several other claims for relief. Plaintiff alleged that General Bowman's appointment violated "the Constitution and laws of the United States." Complaint ¶ 27. And on that basis plaintiff requested a declaratory judgment not only on § 5 grounds, but also on the grounds "that the actions of defendant Riley complained of herein violate his rights protected by § 2 of the Voting Right Acts and the Thirteenth, Fourteenth and Fifteenth Amendments." *Id.* at ¶ 31. It is not clear that this Court's declaratory judgment "that Governor Riley's authority to appoint a person to fill a vacancy on the Jefferson County Commission must be precleared [under § 5]," Mem. Op. at 8, resolves, or even addresses, those separate claims.

b) It is not clear that this Court had the authority to finally adjudicate the merits of

plaintiff's claims for declaratory and permanent injunctive relief at this stage of the litigation. The issue before the Court was plaintiff's motion for a preliminary injunction; the Court's order, however, appears to finally resolve the merits of plaintiff's § 5 claims. It is not clear that proper notice was given concerning any intention to advance the trial on the merits to the hearing on the preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2). "[T]he parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing on the preliminary injunction] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (internal quotation marks omitted). *Accord Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. Sept. 30 1981). Our records reflect that this Court never ordered the trial of the merits to be consolidated with the hearing of plaintiff's motion for a preliminary injunction and, in fact, only instructed the parties to address plaintiff's request for a preliminary injunction. *See, e.g.*, Doc. 16 (scheduling hearing and briefing on "Motion for Preliminary Injunction (Doc. # 6)"); Doc. 23 (rescheduling "oral argument on the plaintiff's Motion for Preliminary Injunction").

c) It is not clear whether this Court's opinion and judgment deny plaintiff's requested preliminary injunctive relief or rather, in effect, grant – albeit contingently – his request for permanent injunctive relief. *Compare* Mem. Op. at 2 ("[W]e find that the Plaintiff is entitled to only declaratory relief.") *and id.* at 7 ("[T]he Court concludes that the Plaintiff's requested preliminary and permanent injunctions

are due to be denied.") *with id.* at 8 (If preclearance is not obtained within 90 days, General Bowman's appointment "shall be vacated *without further order of this court.*" (emphasis added)) and Judgment at 1-2, ¶ (2)(b) (If preclearance is not obtained within 90 days, General Bowman's appointment "shall be vacated on that date *without further order of this court.*" (emphasis added)).

3. The opinion and judgment could be construed to hold that if the State pursues preclearance, the Court intends to vacate General Bowman's appointment after 90 days even if, as is sometimes the case, the preclearance submission is still under active consideration on the 90th day. *See* Mem. Op. at 9, ¶ 3 ("If preclearance is not obtained from either the U.S. Attorney General or the U.S. District Court for the District of Columbia within 90 days, then the appointment of General George F. Bowman to the Jefferson County Commission shall be vacated without further order of this court."); Judgment at 1-2, ¶ (2)(b) ("[I]f preclearance is not obtained by 90 days from the date of this Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court."). If Governor Riley opts to seek preclearance, he would do so without unnecessary delay. However, a submission would take time to prepare, and the entire process, including DOJ consideration, may take longer than 90 days for reasons outside Governor Riley's control. Governor Riley therefore respectfully requests that the Court clarify its opinion and/or judgment to make clear that, in the event the State pursues preclearance, General Bowman's appointment will not be vacated while the

preclearance submission is under active consideration and that the Court, as in *Kennedy v. Riley*, will revisit the issue of remedy once the preclearance process has concluded. In the event the State pursues preclearance, it will, of course, be pleased (as in *Kennedy*) to make monthly progress reports to the Court concerning the status of preclearance proceedings.

4. This Court's opinion and judgment were crafted so as "to allow for a prompt appeal" by Governor Riley to the U.S. Supreme Court and "for the possibility of consolidation on appeal of this case with *Kennedy*" if that course is "desired" by Governor Riley and ordered by the Supreme Court. Mem. Op. at 8; *accord* Judgment at 2. Governor Riley appreciates this Court's efforts in that respect, but believes it important to point out that consolidation in the Supreme Court at this point, even if desired, would be problematic. The Governor has already filed a nearly 15,000-word merits brief in the Supreme Court in the *Kennedy* litigation, and four separate groups of *amici curiae* filed full-length briefs supporting the Governor's position on January 22. The Kennedy appellees' merits brief is due February 13, only 8 days after this Court's February 5 deadline. The case, in short, is well underway. Consolidation at this late stage would inevitably delay the progress of the *Kennedy* case – at considerable cost to the Court, the litigants, and other interested parties.

If an appeal were taken to the Supreme Court from this Court's decision, the Supreme Court would likely "hold" the appeal and dispose of it summarily – either on the merits or via vacatur for further consideration – upon rendering a decision in

Kennedy. *See, e.g.*, Gressman, Geller *et al.*, *Supreme Court Practice* § 5.19, at 366 n.135 (9th ed. 2007) ("The Court's normal procedure, in appeals as well as certiorari petitions, is to vacate the lower court judgment and remand for reconsideration of intervening authority." (citing cases)).

WHEREFORE, Defendant respectfully requests that this Court deny Plaintiff's Motion to Amend Judgment and clarify its Opinion and Judgment as set forth herein.

Respectfully submitted,

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s/ James W. Davis
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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

GOVERNOR RILEY'S NOTICE IN RESPONSE TO THE MEMORANDUM OPINION AND JUDGMENT OF THE COURT

Governor Bob Riley, defendant in this action, respectfully gives this notice in response to the Court's Memorandum Opinion (doc. # 28) and Judgment (doc. # 29), as amended (*see* doc. # 32 & 33).

1. While Governor Riley respectfully disagrees with this Court's holding that preclearance is required, he intends to seek preclearance of applicable matters related to Governor Riley's appointment of General George Bowman to a vacant seat on the Jefferson County Commission.

2. Governor Riley does not waive any rights or positions by seeking preclearance, including, but not limited to, those specifically set out herein. Governor Riley does not waive his arguments raised previously in this action (and a related action) that

preclearance is not required on the facts of this case. In addition, in the event the applicable authority has not ruled upon the preclearance submission within 90 days of January 22, 2008, Governor Riley reserves the right to request that this Court grant additional time for consideration of the preclearance submission. Moreover, in the event that the appointment is vacated at some point by operation of the Court's Judgment, it is Governor Riley's position that the Judgment will at that time become appealable pursuant to 28 U.S.C. § 1253 and other applicable provisions. Governor Riley reserves all rights of mandamus or appellate review available.

WHEREFORE, Governor Riley respectfully gives notice that he intends to seek preclearance as set forth herein.

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ James W. Davis
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Assistant Attorneys General

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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

GOVERNOR RILEY'S NOTICE OF FILING
PRECLEARANCE SUBMISSION

In conformance with his previously file notice to this Court (doc. 34), Governor Bob Riley, defendant in this action, respectfully gives notice that the attached preclearance submission is being sent to USDOJ today for delivery tomorrow.

Governor Riley does not waive any rights or positions by seeking preclearance, including, but not limited to, those specifically set out herein. Governor Riley does not waive his arguments raised previously in this action (and the related *Kennedy* litigation) that preclearance is not required on the facts of this case. In addition, in the event USDOJ has not ruled upon the preclearance submission by April 21, 2008, Governor Riley reserves the right to request that this Court grant additional time for consideration of the preclearance submission.

Governor Riley reserves all rights of appellate review and/or mandamus.

Due to the file size, the preclearance submission will be attached in two segments. Further, due to the size of the submission, hard copies will be provided to the Court.

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ Misty S. Fairbanks
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Misty S. Fairbanks (FAI005)
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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
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FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES
(filed March 22, 2008)

The defendant Bob Riley, in his official capacity as Governor of the State of Alabama, hereby appeals to the Supreme Court of the United States from the *Judgment* entered in this case on January 22, 2008, (doc. 29) and the *Memorandum Opinion* of the same date (doc. 28), as amended by this Court's *Order* of January 25, 2008, (doc. 32) and reduced to an *Amended Judgment* (doc. 33) on the same date. This appeal is intended to be fully inclusive of any and all matters currently, finally resolved by the district court and thereby supporting an appeal.

The United States District Court expressly characterized the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) as final. Governor

Riley has advanced a contrary argument that neither the *Judgment* (doc. 29) nor the *Amended Judgment* (doc.33) is yet a true final judgment, because, *inter alia*, both the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) cause injunctive relief to spring into being next month, if preclearance is not obtained. *See* doc. 34. To prevent a jurisdictional cloud from forming over the present litigation, however, and to secure the fundamental right to appellate review, this notice of appeal is being filed.

In related litigation (*Riley v. Kennedy*, Case No.07-77, United States Supreme Court, pending), the plaintiffs have argued that Governor Riley's failure to appeal from an earlier declaratory judgment of the United States District Court is fatal to his appeal. In response, Governor Riley has argued that the declaratory judgment which failed to effect final relief was not a final judgment for purposes of an appeal. Governor Riley believes that his appeal in *Riley v. Kennedy* was timely, and the United States has agreed with the Governor's position. The United States Supreme Court has not decided the issue, however. Moreover, unlike the subsequent injunction at issue in *Riley v. Kennedy*, the injunction in this case springs into being upon the occurrence of events, without further order of the United States District Court. In any event, both the circumstances of this case and prudence dictate that a notice of appeal be filed at this time. Governor Riley reserves his right to file additional notices of appeal, as necessary, should the injunctive relief contemplated by the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) actually spring into being next month, or should other relief be awarded to the plaintiff.

This appeal is taken pursuant to 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."); 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); and, 28 U.S.C. § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.").

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ Margaret L. Fleming
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Misty S. Fairbanks (FAI005)
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Counsel for Governor Riley

[Certificate of Service omitted]

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite,

standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in

accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Act No. 784 H. 950 – Gafford

AN ACT

To provide that when a vacancy occurs on the governing body of Jefferson County, the Election Commission of Jefferson County shall adopt a resolution providing for a special election, with a run-off election, if necessary, to fill such vacancy; to provide how a person shall become a candidate for the office to be filled; to provide that any person elected to fill a vacancy hereunder shall serve the unexpired term which the person occupying said office when the vacancy occurred would have served if the vacancy had not occurred; to provide that the general laws of the State governing elections shall apply to any election held under the Act, except as the Act otherwise provides; to provide that no person shall be appointed to fill such vacancy; and to repeal Section 145, Title 62, Code of Alabama of 1940, and any other laws or parts of laws in conflict with the Act.

Be It Enacted by the Legislature of Alabama:

Section 1. As herein used, the following terms have the meanings hereby ascribed to them: "the County" means Jefferson County, Alabama; "a vacancy" means a vacancy on the governing body of the County caused by death, resignation, impeachment, or any cause except normal expiration of terms; "first election hereunder" means the first election for which this Act provides to fill a vacancy as distinguished from the run-off election held hereunder, if a run-off election is necessary; "run-off election hereunder" means the run-off election for

which this Act provides, if no candidate at the first election hereunder receives a majority of the votes cast; "a County wide election" means any election, whether general, special or primary, including run-off elections, whereat qualified electors throughout the County are entitled to vote and which is held to elect a Federal, State or County officer or to nominate a candidate or candidates, for a Federal, State or County office or offices, to submit one or more questions, including, but not limited to, the question of adopting a proposed amendment to the Constitution of Alabama and the question of whether general obligation bonds, or revenue bonds, of the State or County shall be issued; "a scheduled County wide election" means a County wide election which is scheduled to be held on a date definitely determined when a vacancy occurs; and "the Election Commission" means the Election Commission of the County.

Section 2. Within seven days from the occurrence of any vacancy the Election Commission, by a majority vote thereof, shall adopt a resolution stating the dates on which the first election hereunder and the run-off election hereunder, if necessary, will be held. The said dates will be determined as provided for in Section 3 and 4, below.

Section 3. If when a vacancy occurs a County wide election is scheduled to be held more than forty days and not more than 180 days from the date whereon the vacancy occurs, the first election hereunder, to fill such vacancy, shall be held on the County wide election date. If when the vacancy occurs there is no County wide election scheduled to be held more than forty days and not more than 180 days after the date whereon the vacancy occurs the

first election hereunder, to fill the vacancy, shall be held on a date specified by the Election Commission in the resolution, provided for in Section 2, above, which date shall be not less than thirty-three days and not more than forty days from the date on which the resolution is adopted.

Section 4. If when the resolution, provided for in Section 2, above, is adopted, a County wide election is scheduled to be held not less than three weeks and not more than eight weeks from the date on which the resolution provides the first election hereunder shall be held, to fill said vacancy, the run-off election hereunder, if necessary, shall be held on the date on which said County wide election is scheduled to be held. If when the resolution, provided for in Section 2, above, is adopted, there is no County wide election scheduled to be held not less than three weeks and not more than eight weeks from the date on which the resolution provides for the first election hereunder to be held, the resolution shall provide for the run-off election hereunder, if any run-off election is necessary to be held three weeks subsequent to the date on which the first election hereunder will be held to fill the vacancy.

Section 5. Any person elected to fill a vacancy hereunder shall serve the unexpired portion of the term which the person occupying said office when the vacancy occurred would have served if the vacancy had not occurred.

Section 6. The first election hereunder and the run-off election hereunder, if a run-off election is required, shall be held on the dates provided for in the resolution adopted under Section 2, above. The provisions of the election laws governing the

registration of voters, equipment at polling places, furnishing of supplies, appointment of election officers, voting and canvassing returns at a general election shall apply to any election held hereunder, except as herein otherwise provided.

Section 7. The failure of the Election Commission to provide for the first election hereunder, or the run-off election hereunder, within seven days from the occurrence of a vacancy shall not terminate the jurisdiction and duty of the Election Commission to provide for such first election or such run-off election.

Section 8. No primary election shall be held to nominate a candidate to fill a vacancy under the provisions of this Act. At any election held under this act no person's name shall appear on the ballot as a candidate for the office to be filled at said election unless such person has filed in the office of the Judge of Probate of the County within the time and in the forms prescribed below in the Section 8 his statement of candidacy and the petition signed by at least one hundred qualified electors requesting that such person become a candidate for the said office.

Any person desiring to become a candidate at any election hereunder may become such candidate by filing in the office of the Judge of Probate of the County such person's statement in writing of such candidacy, accompanied by such person's affidavit taken and certified by such Judge of Probate, or by a Notary Public, that such person is duly qualified to hold the office for which the person desires to be a candidate. Such statement shall be filed at least twenty-one days before the date set for such election;

and shall be in substantially the following form:

"State of Alabama, Jefferson County.

I, the undersigned, being first duly sworn, depose and say that I am a citizen of Jefferson County in Alabama, residing at _____ in said County, that I desire to become a candidate for the office of _____ at the election for said office to be held on the _____ day of _____, and that I am duly qualified to hold said office if elected thereto; I hereby request that my name be printed on the official ballot at said election.

Signed _____

Subscribed and sworn to before me, the undersigned (Probate Judge or Notary Public, as the case may be) on this the _____ day of _____, 19 _____

_____

(Judge of Probate or Notary Public as the case may be)"

Said statement shall be accompanied by a petition signed by at least one hundred persons who shall be qualified to vote at said election, requesting that such person become a candidate for said office at said election. The signers to said petition shall set forth their names in full and their residence addresses, and said petition shall be in substantially the following form:

"We, the undersigned, duly qualified electors of Jefferson County, and residing at the places set opposite our respective names, do hereby request that the name of _____ be placed upon the official ballot as a candidate for the office of _____ at the election for said office to be held in said County on the _____ day of

_____. We further state that we know that said _____ possesses the qualifications necessary for said office, and is in our judgment a fit and proper person to hold said office. Witness our hands on this the _____ date of _____, 19_____."

No name shall appear upon said ballot as a candidate for election except the names of such persons as have become candidates according to the provisions as set forth above. If voting machines are used in the County, the names of candidates shall be suitably placed on voting machines.

Section 9. No persons shall be appointed to fill a vacancy. Section 145, Title 62, Code of Alabama of 1940, and all other laws and parts of laws, whether general, local or special in conflict herewith, are hereby repealed to the extent of any such conflict.

Section 10. This Act shall become effective upon its approval by the Governor or its otherwise becoming a law.

Approved May 25, 1977.

Time: 4:30 P.M.

Act No. 2004-455 S. 331 – Senator Holley

AN ACT

To amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of county commissioner.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 11-3-6 of the Code of Alabama 1975, is amended to read as follows:

"§11-3-6.

"Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Section 2. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

Approved May 14, 2004

Time: 11:15 A.M.

Act No. 2007-488 H. 139 – Rep. Lindsey

AN ACT

* * *

Be It Enacted by the Legislature of Alabama:

Section 1. Sections 11-1-8, 11-3-1, 11-3-2, 11-3-3, 11-3-7, 11-3-8, 11-3-18, 11-3-20, 11-3-21, 11-3-22, 11-8-3, 11-8-9, and 11-8-10, Code of Alabama 1975, are amended to read as follows:

* * *

"§11-3-1

* * *

"(b) Unless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor. If the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-16-11, the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein. The person so appointed to fill the vacancy shall meet the residency requirements in subsection (a), and shall hold office from the date of appointment until the eighth day following the next general election. If the original term in which the vacancy occurred would not have expired on the eighth day following the next general election after the appointment, the person elected at the election

required by operation of this subsection shall serve for a period of time equal to the remainder of the term in which the vacancy was created. Thereafter, election for the county commission seat shall be as otherwise provided by law.

* * *

"(f) Except as specifically provided in subsections (b) and (c), this section applies in all counties and may not be altered or amended by local law. Any existing local law or portion thereof in conflict with this section is specifically repealed to the extent of the conflict effective with the next election following the effective date of the act adding this subsection. It is the intent of the foregoing that a portion of a local law in direct conflict with this section shall be repealed, and any remaining portions of the local law not in conflict shall remain in full force and effect.

* * *

Section 3. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

Approved June 14, 2007

Time: 5:00 P.M.

Official Recompilation of the Constitution of Alabama of 1901, as Amended

Article IV.

Legislative Department.

Sec. 105. Special, private or local laws – Prohibited in cases provided for by general law; exception as to time of holding courts; partial repeal of general laws.

No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law.

Willie H. STOKES

v.

Lionel W. "Red" NOONAN, in his capacity as Judge of the Probate Court of Mobile County, et al.

86-1082.

Supreme Court of Alabama.

Sept. 30, 1988.

BEATTY, Justice.

The plaintiff, Willie H. Stokes, appeals from a judgment in favor of defendant Lionel W. "Red" Noonan, et al., holding that Act No. 85-237, Acts of Alabama 1985, is valid and constitutional.

Stokes, as a registered voter, taxpayer, and real property owner of Mobile County, filed suit in April 1987 contesting the constitutionality of Act No. 85-237, which provides for the filling of vacancies on the Mobile County Commission by a special election when at least 12 months remain on any commissioner's unexpired term:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in

> the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Stokes contends that the subject of local Act No. 85-237 is subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), is unconstitutional.

Section 105, in pertinent part, states: "No special, private, or local law . . . shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, § 104(29), Constitution of 1901, which states, in pertinent part:

> "The legislature shall not pass a special, private, or local law in any of the following cases:
>
> ". . . .
>
> "(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties . . . ."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was *primary*, meaning "that a local law cannot be passed upon that subject." This Court added at 813:

> "By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute."

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala.Code 1940 as Title 12, § 6. See also Ala.Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see

Constitution of 1901, § 110; *Peddycoart,* 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear—and it is in this case. See *Buskey v. Mobile County Board of Registrars,* 501 So. 2d 447 (Ala.1986).

In *Baldwin County v. Jenkins,* 494 So. 2d 584 (Ala.1986), a similar question dealing with the constitutionality of a local act was resolved. In that case, this Court was confronted with two statutes dealing with the election and terms of the office of county commissioners. This Court held that the general statute, Code of 1975, § 11-3-1, as amended, having contained the language, "unless otherwise provided by local law," manifested a legislative intent that the subject it dealt with not be subsumed within it:

> "A situation completely opposite and contrary to the one presented here was contemplated and prohibited by the constitutional framers, which is to say that the legislature, by enacting a general law *containing no such provision or exception for contrary local laws,* thereby intended that general law to be *primary* and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit

> the enactment of contrary local laws. Such is not the case with respect to § 11-3-1 and Act No. 84-639. Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be 'subsumed' exclusively within § 11-3-1. That being the case, the co-existence of the general law (§ 11-3-1) and the *contrary* local law (Act No. 84-639) deferred to in the general law, cannot be said to be repugnant to § 105 because 'the constitutional framers have [only] prohibited the enactment of a local act when the subject [as intended by the legislature] is already subsumed by the general statute.' *Peddycoart*, [354 So.2d at 813]."

494 So. 2d at 587. (Emphasis in *Jenkins*.)

No such intent is demonstrated by the language of § 11-3-6 regarding filling of vacancies, and that language must be given effect according to its terms. Thus, it is our duty to declare Act No. 85-237 unconstitutional as violating § 105. It follows that the judgment appealed from must be, and it is hereby, reversed, and a judgment rendered declaring that Act unconstitutional.

REVERSED AND JUDGMENT RENDERED.

TORBERT, C.J., and JONES, SHORES and HOUSTON, JJ., concur.

MADDOX, J., concurs specially.

ALMON, J., concurs in the result.

ADAMS and STEAGALL, JJ., dissent.

MADDOX, Justice (concurring specially).

I concur completely with the opinion holding that Act No. 86-237 is unconstitutional under § 105, under this Court's decision in *Peddycoart*, cited in the majority opinion.

I do not believe it is necessary to distinguish *Baldwin County v. Jenkins,* 494 So.2d 584 (Ala.1986), which I thought was incorrectly decided, for the reasons I expressed in a dissent in that case; therefore, I concur specially.

STEAGALL, Justice (dissenting).

I respectfully dissent as to the majority opinion's reversal of the trial court's decision that Act No. 85-237 is valid and constitutional.

The Mobile County Commission was created on August 7, 1957, when the Alabama Legislature passed Act No. 181, Acts of Alabama 1957, a local act. The Act created the Mobile County Commission out of the existing board of revenue and road commissioners and provided for the election of its members, those members' terms of office, qualifications for that office, and various other requirements dealing with that body, including the filling of vacancies when they occurred. That Act states specifically:

> "Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified."

Act No. 181, § 2(b), Acts of Alabama 1957, at 234.

The local act being question here, Act No. 85-237, Acts of Alabama 1985, states, in regard to vacancies on the Mobile County Commission:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Act No. 85-237, Acts of Alabama 1985, at 137.

This Court has on several occasions upheld trial courts' rulings that a local act amending a local act is not unconstitutional. In *Freeman v. Purvis,* 400 So.2d 389 (Ala.1981), the Court upheld a trial court ruling which found that:

> "Act 80-797 passed in the 1980 regular session of the Legislature of Alabama, is a Local Act which amends a local act and is not unconstitutional."

400 So.2d at 390. The Court then stated:

> "Accordingly, the trial court was correct when it held that Act No. 797 was a local law which amended Act No. 710, a pre-existing local law."

400 So.2d at 392.

Local Act 85-237 is amendatory in nature, affecting the already-existing local legislation, which created the Mobile County Commission and provided for the filling of vacancies.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), we stated, regarding legislation passed before and after that decision:

> "Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases."

354 So.2d at 814.

The effect of this passage was to say that the new standard established in *Peddycoart* as to the constitutionality of local legislation would be applied only prospectively. *Ex parte Bracewell*, 407 So.2d 845 (Ala.1979), *reversed on other grounds*, 457 U.S. 1114, 102 S. Ct. 2920, 73 L.Ed.2d 1325 (1982). Where, as here, we are looking at legislation enacted prior to *Peddycoart* but amended afterwards, this Court is required to apply the law as it stood before *Peddycoart*. That law can be found in the case of *Johnson v. State ex rel. City of Birmingham*, 245 Ala. 499, 17 So.2d 662 (1944):

> "Sec. 105 of the Constitution is not construed to inhibit local legislation on a subject not prohibited by the Constitution, merely because the local law is different, and works a partial repeal of a general law."

245 Ala. at 503, 17 So.2d at 664, citing *Talley v. Webster,* 225 Ala. 384, 143 So. 555 (1932). This Court, in *Talley v. Webster,* in determining whether a statute violated Section 105 of the Constitution, stated:

> "We need not review the numerous cases construing this section. Suffice it to say it does not inhibit the passage of local laws on subjects, not prohibited by Section 104, merely because such local law is different, and works a partial repeal of the general law of the state in the territory affected."

225 Ala. at 385, 143 So. at 555.

In the case of *Norris v. Seibels,* 353 So.2d 1165 (Ala.1977), this Court reversed a judgment of the Alabama Court of Civil Appeals and held that a showing of specific legislative intent was necessary to effect any such repeal:

> "This general statute cannot be repealed by implication found in the local statute unless the legislative intent to effect such a repeal is clearly manifested."

353 So. 2d at 1167. This Court held that the language used in the questioned local statute contained no express repeal of the general statute. However, such is not the case here. Section 3 of Act 85-237, Acts of Alabama 1985, demonstrates a specific legislative intent by expressly repealing "[a]ll laws or parts of laws which are in conflict with this act."

Because I believe that Act 85-237, a local act, is amendatory in nature and therefore that the law to be applied is that existing prior to our decision in

Peddycoart, supra, I believe the trial court's judgment should be affirmed.

ADAMS, J., concurs.

Bob RILEY, as Governor of Alabama

v.

Yvonne KENNEDY et al.

1050087.

Supreme Court of Alabama.

Nov. 9, 2005.

Rehearing Denied Nov. 15, 2005.

STUART, Justice.

Bob Riley, in his official capacity as Governor of Alabama, appeals a judgment of the Montgomery Circuit Court holding that a vacancy on the Mobile County Commission should be filled by a special election. We reverse and remand.

Facts

In an election held on September 13, 2005, Sam Jones, the county commissioner for district 1, Mobile County Commission, was elected to the office of mayor of the City of Mobile. On September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, registered voters in Mobile County and residents of district 1 (hereinafter referred to collectively as "Kennedy"), filed a pleading in the Montgomery Circuit Court containing the following: a complaint seeking a declaration as to whether Alabama law requires the vacancy in the district 1 seat on the County Commission to be filled by a special election; a petition for a writ of mandamus directing Don Davis, probate judge of Mobile County

to conduct such a special election to fill the district 1 seat; and a request for an injunction prohibiting Governor Riley and the other defendants[1] from acting to the contrary.

According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the County Commission to assume the office of mayor. Kennedy averred that Governor Riley could not make such an appointment, because, she argued, Act No. 85-237, Ala. Acts 1985, requires that "a special election be held to fill the vacancy, and, if a special election is not held, [Kennedy] and other similarly situated registered voters of the County of Mobile will be disenfranchised and denied the opportunity to vote for a candidate of their choice to fill the vacancy mentioned."

Governor Riley answered the complaint, asserting that he is authorized by general law to fill the vacancy and that Act No. 85-237, Ala. Acts 1985, relied on by Kennedy, was declared unconstitutional by this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). Act No. 85-237, he argues, is therefore void, and it was not revived, as Kennedy argues, by the legislature's subsequent enactment of Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala.

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1. In addition to naming Governor Riley as a defendant, the complaint also named Don Davis, in his official capacity as probate judge of Mobile County; the Mobile County Commission; and Stephen Nodine and Mike Dean, in their official capacities as members of the Mobile County Commission. Governor Riley is the only defendant who appealed.

Code 1975.

On September 29, 2005, after hearing argument by counsel, the Montgomery Circuit Court, apparently giving a field of operation to Act No. 85-237, Ala. Acts 1985, held that the vacancy on the Mobile County Commission must be filled by a special election rather than by appointment by the Governor. On October 3, 2005, Sam Jones, the commissioner for district 1, resigned to assume the office of mayor of the City of Mobile. On October 11, 2005, Governor Riley appealed.

Standard of Review

> " 'This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.' *Scott Bridge Co. v. Wright,* 883 So.2d 1221, 1223 (Ala.2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville,* 669 So.2d 812, 815 (Ala.1995)."

Continental Nat'l Indem. Co. v. Fields, 926 So.2d 1033, 1034-35 (Ala.2005).

Discussion

Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see *Stokes v. Noonan,* and that, therefore, the trial court erred in declaring that the vacancy on the Mobile County Commission created by Jones's resignation should be

filled by a special election.[2]

In *Stokes,* this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in *Stokes* argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

> " 'Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.' "

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala.Code

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2. We review this issue only as presented by these facts and by the parties' arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided *Stokes:* " 'In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.' " 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala.Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: "No special, private, or local law . . . shall be enacted in any case which is provided for by a general law." We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, § 11-3-6, Ala. Code 1975, and, consequently, we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala.Code 1975, to read as follows: "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

> " 'statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984).'
>
> "*Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala.1987)."

Gotcher v. Teague, 583 So. 2d 267, 268 (Ala.1991). Moreover, although curative statutes are "of necessity" retroactive, *Horton v. Carter*, 253 Ala. 325, 328, 45 So. 2d 10, 12 (1950), even they are subject to the same rule of statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in *Horton* expressly provided: "This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its

otherwise becoming a law." 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, *e.g.*, § 34-8-28(h), Ala. Code 1975 ("The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998."); § 11-50-16(c), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive . . . ."); § 11-43-80(d), Ala.Code 1975 ("The provisions of this section shall be curative and retroactive . . . ."); and Act No. 2001-891, § 5, Ala. Acts 2001 ("It is the intent of the Legislature that this act be construed as retroactive and curative.").

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is "[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, *to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission.*" (Emphasis added.) The language "to authorize the Legislature . . . to provide" the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies prospectively only;

consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Conclusion

Based on the foregoing, we conclude that the trial court erred in holding that the vacancy on the Mobile County Commission should be filled by a special election. Its judgment so holding is, therefore, reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NABERS, C.J., and SEE, LYONS, HARWOOD, SMITH, BOLIN, and PARKER, JJ., concur.

WOODALL, J., concurs in the result.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

SECOND NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(filed May 20, 2008)

The defendant Bob Riley, in his official capacity as Governor of the State of Alabama, hereby appeals to the Supreme Court of the United States from the *Judgment* entered in this case on January 22, 2008, (doc. 29) and the *Memorandum Opinion* of the same date (doc. 28), as amended by this Court's *Order* of January 25, 2008, (doc. 32) and reduced to an *Amended Judgment* (doc. 33) on the same date. This appeal is intended to be fully inclusive of any and all matters currently, finally resolved by the district court and thereby supporting an appeal.

Governor Riley filed a notice of appeal on March 22, 2008. That notice is adopted and incorporated herein by reference. This second notice is filed in light of certain jurisdictional issues that will be addressed in Governor Riley's jurisdictional

statement to the United States Supreme Court, which will be submitted May 21, 2008.

The district court's amended judgment provided that Governor Riley's appointment of General George F. Bowman to the Jefferson County Commission would be vacated, "without further order of th[e] Court," if not precleared within 90 days of January 22, 2008. *Amended Judgment* (doc. 33). (Governor Riley submitted a request for preclearance to the United States Department of Justice, which was delivered on March 20, 2008. The submission is pending.) The original notice of appeal was filed within 60 days of that judgment, although the contingencies that would trigger the court's remedy order had not come about.

On April 16, 2008, the district court denied Governor Riley's motion to stay, but stayed its judgment "until the earlier of sixty days from the date of the preclearance submission, or the date of the written response by the Attorney General to [the] preclearance submission." *Order* (doc. 45). On April 18, 2008, the United States Supreme Court entered an order staying the judgment of the district court.

This Second Notice of Appeal is filed within 60 days of April 21, 2008 – the date that the appointment would have been vacated by operation of the Amended Judgment, if not stayed. This Second Notice of Appeal is also filed within 60 days of May 19, 2008, the latest date on which the appointment would have been vacated pursuant to the district court's judgment and stay order, if the United States Supreme Court had not entered a stay.

This appeal is taken pursuant to 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."); 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); and, 28 U.S.C. § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.").

Respectfully submitted,

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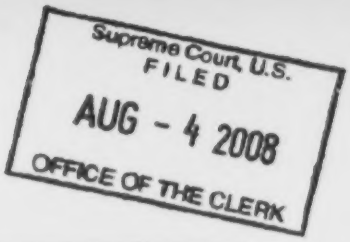
101



(3)

No. 07-1460

In the
Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF GOVERNOR BOB RILEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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August 4, 2008

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

1. The evolution of the facts since Governor Riley filed his Jurisdictional Statement demonstrates the burden Section 5 places on covered States, and by extension, on our Federal system of government. 1

2. Governor Riley's appeal is timely. 6

3. Section 5 does not reach a return to a coverage-date practice. 8

4. The unchallenged back-to-back elections in Jefferson County in 1982 were a "temporary misapplication of state law," such that the practice of special elections was never "in force or effect." 9

5. The District Court improperly skipped to the merits, thereby creating an additional basis for vacating and remanding the judgment below. 11

CONCLUSION 11

APPENDIX

Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King and Ala. Ass't Att'y Gen. Misty S. Fairbanks (May 8, 2008) 1a

Working, et al. v. Jefferson County Election Commission,
___ So. 2d ___ (Ala. June 30, 2008) 6a

Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King (July 22, 2008) 42a

Complaint in *Powell v. Alabama*, Case No. 2:08-cv-01345-LSC (N.D. Ala., pending) 46a

TABLE OF AUTHORITIES

Cases

Catlin v. United States,
324 U.S. 229 (1945) 7

City of Lockhart v. United States,
460 U.S. 125 (1983) 10

Idlewild Liquor Corp. v. Epstein,
370 U.S. 713 (1962) 7-8

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 7

Peddycoart v. City of Birmingham,
354 So.2d 808 (Ala. 1978) 4

Perkins v. Matthews,
400 U.S. 379 (1971) 10

Riley v. Kennedy,
553 U.S. ___ (May 27, 2008) ..... *passim*

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 (1944) 2

Stokes v. Noonan,
534 So.2d 237 (Ala. 1988) 2

Working, et al. v. Jefferson County Election Commission,
___ So. 2d ___ (Ala. June 30, 2008) ..... *passim*

Young v. Fordice,
520 U.S. 273 (1997) 10

Constitutional Provisions

U.S. Const. amend. XIII 6

U.S. Const. amend. XIV 6

U.S. Const. amend. XV 6

Ala. Const. Art. IV, § 105 ..... 2, 3

Statutes and Acts

28 U.S.C. § 2101 6

Ala. Act No. 57-429 8-9

Ala. Act No. 77-784 ..... 1, 2, 4

Ala. Act No. 2007-488 ..... 2, 4

Ala. Code § 11-3-1(b) 4-5, 9

Ala. Code § 11-3-1(f) 4-5

Voting Rights Act
42 U.S.C. § 1973, et seq. ..... *passim*

Section 2
42 U.S.C. § 1973 6

Section 5
42 U.S.C. § 1973c ..... *passim*

Other Authorities

Fed.R.Civ.Proc. 54(b) 6

Fed.R.Civ.Proc. 58 7

Complaint in *Powell v. Alabama*, Case No. 2:08-cv-01345-LSC (N.D. Ala., pending) 5-6

Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (February 4, 2008) 4

Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King and Ala. Ass't Att'y Gen. Misty S. Fairbanks (May 8, 2008) 3

Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King (July 22, 2008) 5

Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* Supreme Court submission) 5

Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission) 5

BRIEF IN OPPOSITION

Governor Riley's Jurisdictional Statement sought to emphasize the similarities between the present case and the then-pending appeal in *Riley v. Kennedy*, Case No. 07-77. After the Jurisdictional Statement was filed, this Court issued its narrowly tailored decision, *Riley v. Kennedy*, 553 U.S. ___ (May 27, 2008), and the Alabama Supreme Court issued a decision of some import, *Working, et al. v. Jefferson County Election Commission*, ___ So. 2d ___ (Ala. June 30, 2008). *Working* triggered additional key events, which are discussed below. Still, § 5 itself, as well as substantial federalism concerns, compel resolution of this appeal in Governor Riley's favor.

1. The evolution of the facts since Governor Riley filed his Jurisdictional Statement demonstrates the burden Section 5 places on covered States, and by extension, on our Federal system of government. These facts spring from the Alabama Supreme Court's decision in *Working, et al. v. Jefferson County Election Commission*, ___ So. 2d ___, 2008 WL 2569255 (Ala. June 30, 2008), reprinted at Appendix 6a. The litigation presented a state court challenge to the Jefferson County local law at issue here, Act No. 77-784.

Litigants (including Governor Riley) challenged the state-law validity of a special election called by local officials pursuant to the Act No. 77-784. The trial court held that state law required a special election; the Alabama Supreme Court reversed, ruling that Governor Riley's appointment was valid,

and the special election invalid. *See* Appendix at 32a-41a.

Governor Riley had argued in state court that Act No. 77-784 violated § 105 of the Alabama Constitution. His argument was predicated on the authority of *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), one of the decisions at the heart of the *Riley* appeal and a decision on which the Governor relied in appointing Commissioner Bowman. Citing the principle that courts should avoid constitutional questions if the matter may be decided on other grounds,[1] the Alabama Supreme Court resolved *Working* on statutory grounds, holding that Act No. 2007-488 (reprinted at J.S. Appx. 51a) had repealed the Jefferson County local law. *See* Appendix at 32a-39a. The Court did *not* hold that Act No. 77-784 was constitutional, nor did it question its holding in *Stokes*; the Court simply affirmed Governor Riley's position on grounds different from those advanced by him.

The Alabama Supreme Court thus ruled that the Governor's appointment was proper, but for a different reason than was offered by the Governor and that was considered by the District Court in this case. Nonetheless, the difference in reasoning does not defeat the Governor's appeal for three reasons. First, the *Working* decision, issued in June 2008, does not change the fact that Governor Riley made the appointment at issue here in November 2007, some seven months earlier, because Alabama

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[1] *Cf. Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such [questions are] unavoidable").

Supreme Court precedent compelled the appointment.[2] The circumstances that gave rise to this litigation and appeal take the preclearance question here presented outside the normal confines of § 5 analysis within which the Plaintiff attempt to box it, *e.g.*, M.D.A. at 26-27.

Second, the Alabama Supreme Court's notation of § 105's "direct[ion that] the judicial branch . . . decide disputes under that provision" was made in the course of the Court's conclusion that the voter plaintiffs before it had standing. *See* Appendix at 20a-21a, n. 8. The Court was explaining that this provision undercuts any suggestion that its resolving the dispute would be contrary to the Separation of Powers concerns that animate the standing doctrine. *Id.* The Court was not, as Plump suggests, M.D.A. at 13, 29 n.12, rebuking the Governor for interpreting the law, as is required, in the performance of his function of implementing the law.

Third, the Alabama Supreme Court explicitly stated that it was not addressing the constitutional issue, preferring instead to resolve the litigation on statutory grounds. *See* Appendix at 32a. Given that, it is not for Plump to suggest that the Court

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[2] It is because Governor Riley made the appointment based on his understanding of Alabama Supreme Court precedent that USDOJ's letter requesting more information was misguided in, for example, requesting "[a] detailed description of the efforts . . . made . . . to secure the views of the public . . . regarding whether the voting change is retrogressive," *see* Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King and Ass't Att'y Gen. Misty S. Fairbanks (May 8, 2008), Appendix at 4a, and unreasonable in requesting various information on Jefferson County elections "in which an African-American candidate participated from 1997 to present," *id.*, Appendix at 3a.

implicitly rejected the constitutional challenge. *See* M.D.A. at 29 (emphasizing that the *Working* Court had referred to Act No. 77-784 as a "preexisting local law"). Nor are Pump's contentions about the impact of *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), M.D.A. at 28, n.11, on the constitutional analysis of any relevance. Governor Riley disagrees with Plaintiff's assessment of the import of *Peddycoart*, and he made his State law argument to the Alabama Supreme Court, which chose not to address the subject.

That said, the *Working* decision triggered several, additional new facts relevant to this appeal. The Alabama Supreme Court's statutory holding was based on enforcement of two new provisions of Act No. 2007-488, specifically new Ala. Code § 11-3-1(b) and (f). For good reason, those provisions had not been submitted for preclearance at the time that the *Working* Court ruled.[3]

USDOJ responded to news of the *Working* decision by declaring that a submission—filed months earlier as a result of the District Court's decision in this case—could not be reviewed until

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[3] Plump asserts that the State "has expressly refused" to submit provisions. *See* M.D.A. at 2; *see also id.* at 11-12, n.6. In fact, prior to the *Working* Court's decision, no change with respect to Ala. Code § 11-3-1(f) had been identified, and, in any event, it would have been premature to make any submission concerning the interaction between Ala. Code § 11-3-1(f) and Ala. Code § 11-3-1(b) before the latter subsection was independently ready for submission. The preclearance submission concerning other portions of Act No. 2007-488 made clear that Ala. Code § 11-3-1(b) was not appropriate for submission—at that time—because the Legislature was considering repealing the relevant change. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (February 4, 2008) at 1-2.

Ala. Code § 11-3-1(b) was submitted. Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King (July 22, 2008); *see* Appendix at 42a. Ala. Code § 11-3-1(b), as well as Ala. Code § 11-3-1(f) and non-certification of the February 5, 2008 special election, have now been submitted. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* Supreme Court submission).

Additionally, the *Working* Court's enforcement of new Ala. Code § 11-3-1(b) means Commissioner Bowman's appointment is cut short, and an election is to be held this November to select someone to serve out the remainder of Larry Langford's term (that is, until November 2010). Appendix at 39a-40a. The Alabama Supreme Court remanded the case to the trial court "to enter an appropriate order declaring that the required election is to be placed on the November 2008 general election ballot." *Id.* at 40a. The normal qualification deadlines and party primaries had already passed. After a hearing, the trial court entered an order concerning the election details at 5:55 p.m. on Friday, July 25, 2008. On Monday, July 28, 2008, the State submitted the changes within the scope of § 5 embodied in that order for preclearance. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission).

The next day, counsel for Plump filed a Complaint in federal court on behalf of Doris Powell. *Powell v. State of Alabama*. Case No. 2:08-cv-01345-LSC (N.D. Ala., pending). *See* Appendix at 46a. The Complaint seeks a declaratory judgment that preclearance of new Ala. Code § 11-3-1(b) and (f) and the non-certification of the February 5, 2008 special

election are required. *Id.* at 52a. (Powell knew the preclearance submission had made; she referred to it. *Id.* at 50a.) Powell also seeks an injunction preventing the defendants, absent preclearance, from failing to certify the special election results and from going forward with the November election of a new County Commissioner. *Id.* at 52a-53a.

In sum, the Governor's appointment, which he believed to be compelled by Alabama Supreme Court precedent, has been met with two § 5 challenges (*Plump* and *Powell*) and has resulted in three preclearance submissions—so far.

2. Governor Riley's appeal is timely. Plump argues that the District Court's order should be construed an interlocutory, requiring that any notice of appeal be filed within 30 days, not 60 days. *See* 28 U.S.C. § 2101. The order was not final, Plump argues, because the District Court did not address the single-judge claims raised under § 2 and the Thirteenth, Fourteenth, and Fifteenth Amendments and because the relief was uncertain. M.D.A. at 17-25. Plump further suggests that the stays entered by the District Court and this Court have somehow undermined any finality that the order would have otherwise achieved. M.D.A. at 23-25.

As to the unaddressed claims, Governor Riley pointed out to the District Court that it had not spoken to these claims, *see* J.S. Appx. 25a, and it did not respond. While never specifically invoking Rule 54(b) or its key language, the District Court encouraged a prompt appeal and consolidation with *Riley*. Specifically, in both the Judgment and the Amended Judgment, the District Court said: "The clerk of court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to

Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, O7-77, if the U.S. Supreme Court deems consolidation appropriate." *See* J.A. Appx. 13a, 17a.

Paradoxically, the District Court would have punished the Governor for an immediate appeal. The Amended Judgment provided that "the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court" if the Governor notified the court of an intent to "immediately appeal" or if the Governor failed to timely notify the court of his intentions. J.S. Appx. 17a. The only way to keep the Governor's appointment from being vacated in February was for the State to seek preclearance, *id.*, which it did.

As to the curious nature of the judgment, the contingent relief left nothing for the court to do—the hallmark of a final judgment. *See Catlin v. United States*, 324 U.S. 229, 233 (1945). Indeed, the District Court ensured that any of the various contingencies would operate automatically, without the court's further involvement.

As to the stays issued by this Court and the District Court, litigants often seek stays pending appeal, without thereby undercutting their ability to pursue the appeal.

Finally, while it was unclear in late January which—if any—remedy would materialize, it was clear that Governor Riley was "effectively out of court." *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 10 (1983). *Accord, Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715

n.2 (1962). Since then, Governor Riley has filed two notices of appeal – covering the entire range of dates on which the District Court's judgment might have become final. This Court's stay order is the only reason that the Governor's appointment has not been vacated. On balance, then, this Court should conclude that the District Court's order has achieved finality and that Governor Riley's appeal is timely.

3. Section 5 does not reach a return to a coverage-date practice.[4] The plain text of 42 U.S.C. §1973c requires preclearance of a practice or procedure that affects voting if it is different from the practice or procedure in place on the jurisdiction's coverage date. On November 1, 1964, Alabama's coverage date, vacancies on the Jefferson County Commission were filled by gubernatorial appointment. The Governor's appointment is a return to the coverage-date practice, and § 5's text therefore does not require preclearance.

Plump contends that gubernatorial appointment is *not* a return to the coverage date practice because of allegedly different rules for when the appointee's term ends. M.D.A. at 29-31. Under the 1964 practice, Plump argues, the Governor's appointee served for the entire unexpired term if the vacancy occurred within six months of the next general election. *See* Ala. Act 57-429.[5] Under the current

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[4] This argument is equally valid whether the return comes as a result of a legislative repeal or a court's declaration that a statute is unconstitutional. Whatever effect the Alabama Supreme Court's reasoning in *Working* may have on the Governor's remaining arguments, the coverage-date argument remains very much in play.

[5] Governor Riley does not concede that the 1957 statute is the proper "baseline." There was no evidence in the District Court

practice, the appointee serves for the entire unexpired term if the appointment occurs later than "30 days before the closing of party qualifying." Ala. Code § 11-3-1(b).

Two points are particularly relevant. First, the issue of *how* the vacancy is filled is a separate "standard, practice, or procedure" from *how long* the new Commissioner will serve. In both cases—in 1964 and today—vacancies are filled by appointment. That is the only practice at issue in this case. If, in 1964, the appointee would serve a shorter or longer term than under the 2008 practice, that is a separate practice meriting a separate § 5 consideration.

Second, and in the alternative, under both the 1957 local law and the practice sought to be enforced today, the Governor has the authority to appoint and his appointee would face election in November 2008. Even under Plump's argument that the practices can be combined, the State seeks to return to a coverage date practice, and that practice is not subject to the plain text of § 5.

4. The unchallenged back-to-back elections in Jefferson County in 1982 were a "temporary misapplication of state law," such that the practice of special elections was never "in force or effect." No citizen stepped forward to challenge the local law when it was implemented in 1982. The next vacancy did not occur until 2001, and it was filled by gubernatorial appointment.

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that Act No. 57-429 was ever once enforced. Even taking Plump's position as correct, though, the text of § 5 does not reach the return to gubernatorial appointment.

As this Court noted of the facts in *Riley*, "[i]f the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, [*Riley*] would be a close case falling somewhere between the two poles established by our prior decisions." *Riley*, 553 U.S. at ___. At one pole lie *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983); in each of those cases, a practice that was unauthorized by state law was nonetheless "in force or effect" for purposes of § 5 because it was in effect on the *coverage date* designated by the statute. At the other pole lies *Young v. Fordice*, 520 U.S. 273 (1997); there, a voter registration practice was *not* "in force or effect," even though it was precleared and used before being abandoned as a "temporary misapplication of state law." This case likewise falls between the two poles, though, admittedly, it is a little further from *Young* than *Riley* was, given the absence of an early legal challenge and the length of time between its only use and its abandonment.

Ultimately, though, the *relevant* length of time is the period during which the practice of special elections was actually used, not how long it was on the books. Vacancies are infrequent. Here, there was none between the back-to-back use in 1982 and the non-use in 2001. This case is thus closer to *Young* (a temporary misapplication of State law) than *Perkins* and *Lockhart* (where the State was required to keep a coverage-date practice in place). Moreover, as noted in the Jurisdictional Statement, there is reason to believe that one of the 1982 special elections may have been held in violation of § 5, J.S. at 32, n.15; that election ought not be able to establish the § 5 baseline.

5. The District Court improperly skipped to the merits, thereby creating an additional basis for vacating and remanding the judgment below. Plump never addresses the Governor's argument that the District Court erred in skipping to the merits, when there was only a motion for preliminary injunction pending. This argument stands un-rebutted as grounds to vacate and remand for further consideration.

CONCLUSION

This Court should note jurisdiction, and either reverse the District Court or vacate and remand for further proceedings in light of the *Riley* decision, the evolving facts, and the District Court's improper jump to the merits. In the event the case is remanded, the Governor respectfully requests that this Court keep its stay in place pending any subsequent appeal and final decision by this Court.

Respectfully submitted,

Troy King
Attorney General
James W. Davis
Counsel of Record
Margaret L. Fleming
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STATE OF ALABAMA
Attorney General's Office
11 South Union Street
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August 4, 2008

Appendix

U.S. Department of Justice

Civil Rights Division

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

CC:TFM:DJ
DJ 166-012-2
2008-1576

May 8, 2008

The Honorable Troy King
Attorney General
Misty S. Fairbanks, Esq.
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King and Ms. Fairbanks:

This refers to the change in the procedure for filling vacancies on the Jefferson County Commission from special election to gubernatorial appointment, for Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We received your submission on March 19, 2008.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right

to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. The factual basis for the State or county's determination that the proposed change will not result in a retrogression of the effective exercise of the electoral franchise by the African-American voters of Jefferson County Commission District No. 1.

2. A special election was held for Jefferson County Commission, District 1 on February 5, 2008. Please provide any documents, including any analysis or reports that have been done discussing whether Mr. Bowman was the candidate of choice for African-American voters in that special election. For this election, please also provide the following:

(a) the number of votes each candidate received by precinct;

(b) the total number of persons who voted and the number of African-American persons who voted, by precinct, if that information is available;

(c) if a breakdown by race or ethnicity is not available as indicated in paragraph (b) above, copies of the actual voter sign-in sheets for each precinct located in whole or in part within Jefferson County for this election; and

(d) the number of registered voters, by race or ethnicity and precinct, at the time of the election.

3. Please provide any documents, including any analysis or reports that have been done discussing whether there is racially polarized voting in Jefferson County.

4. Please provide election returns by voting precinct for all state, county, municipal, and school district elections in which Jefferson County was included in whole or in part and in which an African-American candidate participated from 1997 to the present. For each election, please indicate the following:

(a) the office sought (indicate the incumbent(s), if any, their races, and whether incumbency was by election or appointment);

(b) each candidate's name and race or ethnicity;

(c) the number of votes each candidate received by precinct;

(d) the total number of persons who voted and the number of African-American persons who voted, by precinct, if that information is available;

(e) if a breakdown by race or ethnicity is not available as indicated in paragraph (d) above, copies of the actual voter sign-in sheets for each precinct located in whole or in part within Jefferson County for each election; and

(f) the number of registered voters, by race or ethnicity and precinct, at the time of the election.

(g) for early and absentee voting, if possible, an identification of the precinct in which early

and/or absentee voters would have voted on election day.

(h) if possible, this information should be provided in electronic format, either Excel or a delimited text file. If a delimited text file, please specify the common delimiter used.

5. The precinct boundaries used for the elections for which election return and voter registration data is requested. If possible, this should be in electronic form. It will expedite our review if we receive this information in "Shape file format," including all three types of files that form components of this format: .shp, .shx, and .dbf files.

6. A detailed description of the efforts, both formal and informal, made by the county or the State to secure the views of the public, including members of the minority community, regarding whether the voting change is retrogressive. Describe the substance of any comments or suggestions received, indicate the names and daytime telephone numbers of the persons making the comments or suggestions, and explain the State or county's response, if any.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. § 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See 28 C.F.R. §§ 51.40 and 51.52(a) and (c).

Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10. Therefore, to enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning this matter. If you have any questions, you should call Donald Jacobsen (202-305-8299) of our staff. Refer to File No. 2008-1576 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of this change is at issue in *Plump* v. *Riley* (Civ. Act. No. 07-1014, M.D. Ala. (three-judge court)) and *Working* v. *Jefferson County*, (No. 08-cv-900316, 10th Jud. Cir., Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,
/s/ Timothy Mellett
for
Christopher Coates
Acting Chief, Voting Section

REL: 06/30/08

[Notice concerning reporting typographical or other errors omitted.]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

1070850

Patricia Working et al.
v.
Jefferson County Election Commission et al.

1070893

Governor Bob Riley, in his official capacity
v.
Jefferson County Election Commission et al.

1070917

George F. Bowman
v.
State of Alabama ex rel. Fred L. Plump and William A. Bell, Sr.

Appeals from Jefferson County Circuit Court
(CV-08-900316)

PER CURIAM.

These appeals arise from challenges to the attempts to fill the district 1 seat on the Jefferson County Commission left vacant when Commissioner Larry Langford was elected mayor of the City of Birmingham in October 2007. The trial court held that the vacant seat was to be filled by a special election rather than by gubernatorial appointment. For the reasons stated herein, we reverse the trial court's judgment.

I. Facts, Procedural Background, and Applicable Statutes

On October 9, 2007, Larry Langford, the member of the Jefferson County Commission representing district 1, was elected mayor of the City of Birmingham. He thereafter resigned his seat on the Jefferson County Commission. On October 29, 2007, the Jefferson County Election Commission, pursuant to Act No. 784, Ala. Acts 1977,[1] adopted a resolution calling for a special election to fill the seat vacated by Langford. The resolution set the special election for February 5, 2008 -- the date of Alabama's presidential-preference primaries. Fred L. Plump, George F. Bowman, and William A. Bell, Sr., were among those who qualified to run for the district 1 seat on the county commission.

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[1] The Alabama Legislature enacted Act No. 784 effective May 25, 1977, as a local law that purported to authorize a special election to fill a vacancy on the Jefferson County Commission caused by "death, resignation, impeachment, or any cause except normal expiration of terms." § 1, Act No. 784.

On November 21, 2007, Governor Bob Riley appointed George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission. The Governor's appointment was made pursuant to a general law, § 11-3-1(b), Ala.Code 1975.[2]

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[2] Section 11-3-1(b) now provides:

> "*Unless a local law authorizes a special election*, any vacancy on the county commission shall be filled by appointment by the Governor. If the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5, the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein. The person so appointed to fill the vacancy shall meet the residency requirements in subsection (a), and shall hold office from the date of appointment until the eighth day following the next general election. If the original term in which the vacancy occurred would not have expired on the eighth day following the next general election after the appointment, the person elected at the election required by operation of this subsection shall serve for a period of time equal to the remainder of the term in which the vacancy was created. Thereafter, election for the county commission seat shall be as otherwise provided by law."

The emphasized language, however, was first included in this statutory scheme effective in 2004. *See* Act No. 2004-455, Ala. Acts 2004. The substance of the first sentence, without the emphasized language, was part of the Alabama Code prior to the enactment of Act No. 784 in 1977. Until September 1, 2007, it was codified as § 11-3-6, Ala.Code 1975. Effective September 1, 2007, the entire provision, including the emphasized language and additional language, was renumbered by Act No. 2007-488 as § 11-3-1(b).

On January 31, 2008, Patricia Working and Rick Erdemir filed a complaint for declaratory relief in the Jefferson Circuit Court, naming as defendants the Jefferson County Election Commission and its individual members, namely Jefferson County Probate Judge Alan King, Jefferson County Sheriff Mike Hale, and Jefferson County Circuit Clerk Anne-Marie Adams. Among other things, they alleged that they were residents and taxpayers in Jefferson County and that the special election was unauthorized and unconstitutional because, they said, Act No. 784, Ala. Acts 1977, violated § 105 of the Alabama Constitution of 1901,[3] and that, even if Act No. 784 was not unconstitutional and authorized the special election, the date set by the Election Commission for the special election was incorrect. Accompanying the complaint were an application for a temporary restraining order and a motion for a preliminary injunction.

On February 1, 2008, the Jefferson Circuit Court conducted an expedited hearing in which it noted the absence of potentially interested parties

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[3] Section 105 provides:

> "No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

and issued an order holding that it would not have subject-matter jurisdiction until the attorney general was served with a copy of the complaint pursuant to Ala.Code 1975, § 6-6-227. It further stated that the matter would be held under submission until the plaintiffs had complied with § 6-6-227. Subsequent to the entry of that order, the attorney general was served with a copy of the complaint and filed an answer stating that he was entitled to be heard on the issue of the constitutionality of Act No. 784, and that because Act No. 784 is unconstitutional, the circuit court should enjoin the Election Commission from canvassing the votes and certifying the results of the special election. In addition, on February 6, 2008, Plump filed a motion to intervene as a defendant, which the court later granted.[4]

The special election was held on February 5, 2008. On February 12, Floyd McGinnis filed a "Joinder of Verified Complaint" and, with Working and Erdemir, amended the complaint to add Bell as a defendant. McGinnis, Working, and Erdemir (collectively referred to as "the Working plaintiffs") each filed a verification in support of the amended complaint.

On February 13, 2008, the Working plaintiffs filed a notice of appeal to this Court from the trial

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[4] Plump, a resident of district 1, is a plaintiff in a federal action challenging Governor Riley's appointment of Bowman to fill the district 1 vacancy on the Jefferson County Commission; that action is based on § 5 of the Voting Rights Act of 1963, 42 U.S.C. § 1973c (2000) and is presently pending review by the United States Supreme Court.

court's February 1, 2008, order and, specifically, its effective denial of a temporary restraining order and a preliminary injunction by holding the case "under submission." On February 14, 2008, this Court granted an emergency motion filed by the Working plaintiffs, enjoining the Election Commission from certifying the results of the special election until further order of this Court. On February 20, 2008, this Court issued an order noting that it appeared the statutory notice requirements pertaining to the attorney general had been met, remanding the cause to the trial court for a ruling on the merits of the Working plaintiffs' claims, and maintaining in place the injunction prohibiting the certification of the results of the February 5 special election pending further order of this Court. (Case no. 1070693.)

On February 21, 2008, the defendants moved to dismiss the action on the bases, among others, that the Working plaintiffs lacked standing to pursue their claims because, as was undisputed, Working and Erdemir did not actually reside in district 1 of Jefferson County and McGinnis had not suffered a sufficient, particularized injury. On February 27, 2008, Plump filed an answer to the complaint and a third-party complaint asserting a quo warranto action as a relator for the State against Bowman. *See* Ala.Code 1975, § 6-6-597.

On February 28, 2008, Governor Riley filed a motion, which was later granted, to intervene as a plaintiff. Also on February 28, the Working plaintiffs filed a second amended complaint, among other things, adding a claim that the Election Commission was required by Act No. 2007-488 to hold an election at the November 2008 general election to fill the

district 1 vacancy and that its refusal to do so was a violation of plaintiff McGinnis's right to vote in such an election.

On March 6, 2008, Bell filed, and on March 9, 2008, the trial court granted, a motion to join and to amend Plump's third-party quo warranto complaint against Bowman. The amended third-party complaint alleged that Bell was entitled to hold the office of County Commissioner for district 1 based on the result of the special election and that Bowman was unlawfully holding that office. Specifically, Bell and Plump alleged:

> "Governor Riley did not have the authority to appoint George Bowman to the District 1 seat because it is clear that a general state statute, Act 2007-488 codified at § 11-3-1(b), that begins 'Unless a local law authorizes a special election,' allows local laws on the same subject to coexist without violating § 105 of the Alabama Constitution. *Baldwin County v. Jenkins*, 494 So.2d 584 (Ala.1986)."

After conducting a hearing, the trial court issued a final judgment. In its judgment, the trial court held that the Working plaintiffs lacked standing to pursue their claims. As to the merits of the litigation, the trial court determined that the local law on which the special election was based, Act No. 784, Ala. Acts 1977, did not conflict with the general law, § 11-3-1(b), and therefore did not violate § 105 of the Alabama Constitution of 1901, because

of the proviso at the beginning of § 11-3-1(b) allowing local laws to authorize special elections to fill vacancies on county commissions. Finally, the trial court held that the Election Commission had set the special election for the correct day.

Consistent with the foregoing determinations, the trial court specifically ruled that Governor Riley's appointment of Bowman to the district 1 seat for the Jefferson County Commission was unauthorized and that, when the final results of the election of February 5, 2008, are certified by the Election Commission, the winner of the election will be entitled to hold the office of Jefferson County commissioner for district 1.

The Working plaintiffs, the Governor, and Bowman each appeal.

II. Subject-Matter Jurisdiction

We are presented with two issues pertaining to subject-matter jurisdiction. These include the standing of the Working plaintiffs to pursue their claims and the potential effect of § 17-16-44, Ala.Code 1975.

A. The Standing of the Working Plaintiffs

In the trial court, the Working plaintiffs asserted that they have standing to bring their claims in this case based on their status as residents and taxpayers of Jefferson County whose taxes go to

the general fund of the County.[5] They alleged that their status in this regard gives them standing to challenge the expenditure of moneys from the general fund for conducting an election not authorized by law.

In their February 21 motion to dismiss, the Election Commission and Sheriff Hale argued to the trial court that the Working plaintiffs did not have standing to pursue their claims because (1) Working and Erdemir were not residents or voters of district 1 and (2) McGinnis, although a district 1 voter, had "not stated or shown with particularity the injury in fact necessary to grant him standing to challenge the constitutionality of 1977 Ala. Act No. 784."[6] The motion to dismiss did not specifically address the Working plaintiffs' status as taxpayers of Jefferson

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[5] They also note that, as residents of Jefferson County, they will be governed by the winner of the election in his capacity as a member of the Jefferson County Commission. In addition, McGinnis notes his status as a voter in district 1 and, further, seeks the right to participate in the election of a county commissioner that, he asserts, should be scheduled for November 2008 in keeping with § 11-3-1(b), Ala.Code 1975.

[6] In their motion to dismiss, the Election Commission and Sheriff Hale also argued, and the trial court subsequently found, that because plaintiffs Working and Erdemir did not have standing, the court lacked subject-matter jurisdiction over the case as originally filed, and therefore the amendment by which McGinnis joined the action as a plaintiff "cannot relate back to the filing of the original complaint, because there is nothing 'back' to which to relate." Because of our disposition of the issue of the Working plaintiffs' standing as taxpayers, we need not address the issue whether McGinnis's joinder of the complaint related back to the date of the filing of the original complaint or, if it did not, whether the trial court nonetheless acquired subject-matter jurisdiction over McGinnis's claims as of the date they were filed.

County or whether that status contributed to their standing to obtain the relief they sought.

In proposed conclusions of law submitted to the trial court in preparation for the final hearing and in arguments presented at that hearing, the Working plaintiffs reasserted their position that their status, particularly as taxpayers, gave them standing to pursue their claims. As noted, however, in its final judgment, the trial court ruled against the Working plaintiffs on the issue of standing. Specifically, it held that because neither Working nor Erdemir were residents of district 1 they did not suffer a legal injury as a result of the special election. Among other things, it agreed with the Election Commission and Sheriff Hale that McGinnis lacked standing because he "had not stated or shown with particularity [an] injury in fact." The trial court did not directly address the issue of taxpayer standing.

On appeal, the Working plaintiffs again assert their status as residents and taxpayers of Jefferson County and again contend that that status gives them standing to pursue this case. In response, the Election Commission and Sheriff Hale urge this Court to uphold the trial court's ruling as to standing on the same grounds cited in the trial court's opinion; they make no substantive argument as to the issue of taxpayer standing.

We note at the outset of our analysis that the fact that neither the defendants nor the trial court has directly addressed the Working plaintiffs' argument as to the issue of taxpayer standing does not provide us with a reason to conclude, by default, that such standing exists. Standing is a component of

a court's subject-matter jurisdiction and, as such, is not subject to waiver. *See Waite v. Waite*, 959 So.2d 610, 613 (Ala.2006); *RLI Ins. Co. v. MLK Ave. Redev. Corp.*, 925 So.2d 914, 918 (Ala.2005). *See also United States v. Hays*, 515 U.S. 737, 742 (1995).

Whether a party has standing "turns on 'whether the party has been injured in fact and whether the injury is to *a legally protected right*' " so as " 'to ensure that he will *vigorously present his case*." ' *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027-28 (Ala.1999). This Court has said that a party has standing where, among other things, there is "an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest.' " *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, LLC*, 890 So.2d 70, 74 (Ala.2003) (relied upon in *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253 (Ala.2004)). We conclude that the Working plaintiffs had standing to bring their claims.

"In a long line of decisions this Court has recognized the right of a taxpayer to challenge, either as unconstitutional or as not conforming to statute, the expenditure of public funds by county officers." *Zeigler v. Baker*, 344 So.2d 761, 763 (Ala.1977) (quoted with approval in *Henson v. HealthSouth Med. Ctr.*, 891 So.2d 863, 866 (Ala.2004)). *See also Alabama State Florists Ass'n, Inc. v. Lee County Hosp. Bd.*, 479 So.2d 720, 722 (Ala.1985); *Court of County Revenues for Lawrence County v. Richardson*, 252 Ala. 403, 412, 41 So.2d 749, 754 (1949); *Reynolds v. Collier*, 204 Ala. 38, 39,

85 So. 465, 466 (1920). In *Broxton v. Siegelman*, 861 So.2d 376 (Ala.2003), this Court stated:

> "[T]he right of a taxpayer to sue ' " 'is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.' " ' *Hunt v. Windom*, 604 So.2d [395] at 396-97 [(Ala.1992)] (quoting *Zeigler v. Baker*, 344 So.2d 761, 763 (Ala.1977), quoting in turn, *Fergus v. Russel*, 270 Ill. 304, 314, 110 N.E. 130, 135 (1915))."

861 So.2d at 385 (emphasis omitted).

The standing of taxpayers to challenge the expenditure of public funds extends to funds expended for holding elections not authorized by law. In *City of Mobile v. Mobile Electric Co.*, 203 Ala. 574, 578, 84 So. 816, 819 (1919), the Supreme Court held that an election to adopt or reject a municipal ordinance would be improper and that "the complainant, as a taxpayer, had the right to enjoin the same." *See also Dennis v. Prather*, 212 Ala. 449, 103 So. 59 (1925) (citing *City of Mobile* with approval). We also take note of the result in *Petree v. McMurray*, 210 Ala. 639, 98 So. 782 (1923), a case in which an appointed county superintendent of education challenged an election that was to be held pursuant to a local law that he contended was in violation of Ala. Const.1901, § 175. The Court affirmed the trial court's order overruling a

demurrer[7] to the complaint, which contained the following allegations:

> "[N]otwithstanding the invalidity of said act, respondents, acting as an election commission, [were] threatening to and [were] about to advertise and call a special election, to appoint inspectors, clerks, etc., in the various voting precincts, and to purchase election supplies, all of which [was] without warrant of law, and it [was] alleged that the pay vouchers for the proposed election officers and the purchase of supplies [would] constitute illegal claims and expenses against the county, to the detriment of [the plaintiff] as a taxpayer; and that the holding of said election [would] tend to interfere with the proper discharge of the duties of his office."

210 Ala. at 640, 98 So. at 782.

Other jurisdictions also hold that a taxpayer has standing to challenge an election paid for with tax funds. For example, in *Bulgo v. Maui County*, 50 Haw. 51, 430 P.2d 321 (1967), a taxpayer challenged the holding of an election that was based on a newly

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[7] The common-law "demurrer" has been succeeded by a motion filed pursuant to Rule 12(b)(6) seeking dismissal of a complaint on the ground that it fails to state a claim upon which relief may be granted. *See Roberts v. Meeks*, 397 So.2d 111, 114 (Ala.1981).

enacted law providing for a special election to fill the term of a county chairman-elect who dies before assuming office. Describing the taxpayer's contention with regard to his standing to challenge the election, the Supreme Court of Hawaii wrote:

> "Plaintiff bases his standing to sue on the fact that he pays real property tax to the county of Maui, which tax goes into the county general fund out of which the expenses of the special elections are payable. He claims the requested relief on the ground that the challenged provision is a special law, violative of Article VII, Section 1, of the State constitution, and, unless restrained by the court, defendant will irreparably damage plaintiff by illegally expending funds raised by taxation in holding elections under an invalid statutory provision."

Bulgo, 50 Haw. at 54, 430 P.2d at 324. The Court held that this was sufficient to confer standing on the plaintiff to pursue his challenge of the election:

> "We hold that plaintiff has a standing to sue in this case. We base this holding on *Castle v. Secretary of the Territory*, 16 Haw. 769 [(1905)]. Although defendant urges that *Castle*, as a controlling authority on the point at issue, has been eroded by *Wilson v. Stainback*, 39 Haw. 67 [(1951)]; *Munoz v. Commissioner of Public*

> *Lands*, 40 Haw. 675 [(1951)]; *Air Terminal Services v. Matsuda*, 47 Haw. 499, 393 P.2d 60 [(1964)]; and *Helela v. State*, 49 Haw. 365, 418 P.2d 482 [(1966)], and should be overruled, we see no reason for doing so. Plaintiff has alleged sufficient personal interest in the controversy to entitle him to a day in court."

50 Haw. at 55, 430 P.2d at 324. *See also, e.g., Board of Supervisors of Elections of Anne Arundel County v. Smallwood*, 327 Md. 220, 233 n. 7, 608 A.2d 1222, 1228 n. 7 (1992) ("[I]ndividual taxpayers in each county also contested the proposed amendments' validity. Individual taxpayers have standing to sue for an injunction against submitting a proposal to the electorate; otherwise, they would be 'put to wrongful expense for the publication of the referendum and the printing of it on the ballots of the next general election.' "[8]

---

[8] Our view of the standing issue in the present case finds further support in the fact that § 105 affirmatively directs the judicial branch to decide disputes under that provision: "[T]he courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court . . . ." The doctrine of standing is rooted in concerns that courts not exceed their proper scope of authority by intruding into matters more properly decided by another branch of government or by citizens as part of the political process. "The power of the judiciary . . . is 'the power to [decide] . . . a particular *case or controversy*.' " *City of Daphne v. City of Spanish Fort*, 853 So.2d 933, 942 (Ala.2003) (quoting *Ex parte Jenkins*, 723 So.2d 649, 656 (Ala.1998)) (emphasis added). In *Allen v. Wright*, 468 U.S. 737 (1984), the United States Supreme Court explained that

"the several doctrines that have grown up to elaborate" the "case or controversy" requirement, including that of standing,

> "are 'founded in concern about the proper -- and properly limited -- role of the courts in a democratic society' *Warth v. Seldin*, 422 U.S. 490, 498 . . . (1975).
>
> > " 'All of the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judi-ciary in our kind of government.' *Vander Jagt v. O'Neill*, 226 U.S.App. D.C. 14, 26-27, 699 F.2d 1166, 1178-1179 (1983) (Bork, J., concurring)."

468 U.S. at 750. The Supreme Court further explained that the standing inquiry turns on whether "adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process,' *Flast v. Cohen*, 392 U.S. 83, 97 . . . (1968)." 468 U.S. at 752. The concerns expressed in *Flast v. Cohen* as to whether a court's resolution of a dispute would be "consistent with a system of separated powers" and whether "the dispute is one traditionally thought to be capable of resolution through the judicial process" are ameliorated in this case by the constitutional directive in § 105 for courts to decide disputes arising under that provision.

In the present case, it is clear that Jefferson County incurred costs in holding the special election for the district 1 county commission seat that it otherwise would not have incurred in administering the presidential-preference primary election on February 5, 2008. Section 17-16-4, Ala.Code 1975, provides that "[t]he State of Alabama shall reimburse a county for all sums expended by the county in payment of expenses incurred in holding and conducting an election in which only candidates for federal or state offices are nominated or federal or state officials are elected."[9] (Emphasis added.) Section 17-16-2 defines, but also limits, the "expenses" for which the State must reimburse counties:

> "As used in this chapter, the term 'expenses' shall include the following items, and no other:
>
> > "(1) The per diem and mileage provided by law for election officials.
> >
> > "(2) The per diem provided by law for the clerk or other official acting in his or her stead

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[9] At least in regard to the payment of election expenses, the legislature has indicated that a presidential-preference primary is to be treated as if it were an election in which "candidates for federal or state offices are nominated or federal or state offices are elected." *See* § 17-13-100(d) (providing that the State of Alabama's obligation to reimburse a county for sums expended in holding and conducting a presidential-preference primary shall be "as provided in Section 17-16-4").

for handling absentee ballots.

"(3) The costs of ballots, supplies, and other materials required by law to be furnished to election officials and certified by the judge of probate as chief election official of the county. In those counties where electronic voting machines are used, such voting equipment shall not be considered as ballots, supplies, or materials, as herein used.

"(4) The costs of absentee ballots, supplies, and other materials required by law to be furnished to the official handling absentee ballots.

"(5) The cost of preparing and furnishing the lists of qualified electors to the election officials as required by law."

Ala.Code 1975, § 17-16-2.

Even as to the specific "expenses" listed in § 17-16-2, however, § 17-16-4 does not obligate the State to reimburse a county for "all sums" expended by the county if the election is one in which candidates or officials for *other than* federal or state offices are to be nominated or elected. As to an election "in which candidates for both federal or state and county offices" are nominated or elected, § 17-16-3 governs. It provides that the State of Alabama is required to reimburse the county only "for one half of all sums expended by the county in payment of expenses incurred in holding and conducting" the election. Ala.Code 1975, § 17-16-3.[10]

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[10] Section 17-16-3 begins with the caveat "[e]xcept as provided in Section 17-8-12." Section 17-8-12, entitled "Compensation of election officials," provides:

> "(a) The inspector and clerks shall each be entitled to base compensation of fifty dollars ($50). *The compensation of the election officials shall be paid as preferred claims, out of moneys in the county treasury not appropriated, on proper proof of service rendered.* In all counties in which the compensation of election officials is prescribed by local law or general law of local application at an amount in excess of the amount prescribed, the compensation of the election officials shall not be decreased under this section and the county commission may increase the compensation so prescribed. In those counties in which compensation of election officials is set at an amount in excess of five dollars ($5) per day, but less than fifty dollars ($50) per day, the provision of the local law or general law of local application relative thereto is superseded and the compensation prescribed herein shall be the total

Finally, we note that, consistent with all of the above-discussed statutory provisions from Chapter 16, the parties stipulated as follows to the trial court:

> "46. Jefferson County's General Fund is used to pay persons to administer elections at the direction of the Jefferson County Election Commission, including the February

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compensation of election officials in the counties.

"(b) In addition to the compensation provided in subsection (a), *each clerk shall be entitled to supplemental compensation paid by the state* to ensure that the total compensation paid to each shall be in an amount of at least seventy-five dollars ($75) per day, and each inspector shall be entitled to *supplemental compensation paid by the state* in an amount that ensures that the total compensation of an inspector is at least one hundred dollars ($100) per day. Upon completion of a local election school or being certified as a qualified poll worker by the probate judge, or both, each clerk and inspector shall be entitled to receive an additional twenty-five dollars ($25) per day in compensation from the state. The increase provided for in this subsection shall not increase or decrease any salary supplement paid under a local law which is in effect on October 1, 2005. *The provisions of this subsection shall only apply to those statewide elections for which county expenses are reimbursed by the state as defined in Chapter 16.* The provisions of this subsection shall not apply to special county or other elections held at any time other than at the time of holding statewide elections."

(Emphasis added.)

> 5, 2008, presidential preference primary election. As a result of the Election Commission's resolving to conduct an election, monies appropriated from Jefferson County's General Fund pay for the printing of ballots used during the February 5, 2008, presidential preference primary election."

As previously noted, this Court has stated that standing "turns on 'whether the party has been injured in fact and whether the injury is to a *legally protected right*.' " *State v. Property at 2018 Rainbow Drive*, 740 So.2d at 1027. On the basis of the foregoing, we conclude that the Working plaintiffs had standing to bring their claims.

B. The Effect of § 17-16-44

Although the trial court did not address the issue, Plump argues on appeal that the trial court lacked subject-matter jurisdiction over all but his and Bell's third-party quo warranto action against Bowman on the basis of Ala.Code 1975, § 17-16-44. That statute provides:

> "No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process, or order from any judge or

> court, whereby the results of any election are sought to be inquired into, questioned, or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person. If any judge or other officer hereafter undertakes to fine or in any wise deal with any person for disobeying any such prohibited injunction, process, or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the Supreme Court then sitting, or next to sit, without bond, and such proceedings shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days."

We disagree.

We begin by noting that § 17-16-40 prescribes grounds for an election contest that go to the manner in which the election was conducted and the eligibility of a candidate to hold the office at issue, and, in those respects, whether the particular outcome of the election was lawful or correct. Those grounds are as follows:

> "(1) Malconduct, fraud, or corruption on the part of any

> inspector, clerk, returning officer, canvassing board, or other person.
>
> "(2) When the person whose election to office is contested was not eligible thereto at the time of such election.
>
> "(3) On account of illegal votes.
>
> "(4) On account of the rejection of legal votes.
>
> "(5) Offers to bribe, bribery, intimidation, or other malconduct calculated to prevent a fair, free, and full exercise of the elective franchise.
>
> "(6) The results of a recount conducted under Section 17-16-20 name as a winner a person other than the person initially certified."

§ 17-16-40, Ala.Code 1975.

The present challenge to the February 5 election does not fall within the scope of an election-contest statute as suggested by the grounds of contest outlined in § 17-16-40. This conclusion comports with even more fundamental principles regarding the jurisdiction of our circuit courts as courts of general jurisdiction and of equity. In *King v. Campbell*, [Ms. 1060804, Nov. 30, 2007] ___ So.2d ___ (Ala.2007), this Court relied upon those fundamental principles to explain the jurisdiction of our circuit courts in relation to election challenges:

"Article VI, § 142(b), Ala. Const. 1901 (Off.Recomp.), provides:

> " '(b) The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law. The circuit court may be authorized by law to review decisions of state administrative agencies and decisions of inferior courts. It shall have authority to issue such writs as may be necessary or appropriate to effectuate its powers, and shall have such other powers as may be provided by law.'

". . . . The legislature has restricted the jurisdiction of the circuit courts by enacting § 17-16-44. . . . In *Dennis v. Prather*, 212 Ala. 449, 103 So. 59 (1925), this Court construed a predecessor statute to § 17-16-44. This Court noted:

> " 'The general rule without question is that courts of equity will not interfere by injunction with the holding of elections political in

> character, nor take jurisdiction of a contest after the election is held. *But this court is committed to the proposition that equity will interfere by injunction to restrain elections not authorized by law. It will also restrain the usurpation of office, or the assumption of functions of office where no lawful office exists.'*

"212 Ala. at 452, 103 So. at 61-62 (emphasis added). Speaking to the predecessor to *§ 17-16-44*, the *Dennis* Court stated:

> " ' *Statutes restricting the jurisdiction of courts of equity*, as defined at common law, and reiterated by statute in Alabama, *should be strictly construed*. Construing this statute as a whole, it appears, broadly speaking, to cover cases inquiring into the validity of elections theretofore held -- a proceeding in the nature of a contest of an election,

> whether the legality, conduct or results of the election be the point of attack. *We doubt if it would include a case of injunction against the exercise of any form of official power, derived through or by virtue of an election not authorized by law and therefore wholly void.* The equity jurisdiction in such case does not rest so much upon matters going to the conduct of the election, but upon the usurpation or abuse of official power under color of a void election.'
>
> "212 Ala. at 452-53, 103 So. at 62 (emphasis added)."

___ So.2d at ___ (some emphasis omitted). Thus, we concluded in *King*, "litigation challenging the consequences of a void election does not come within the sweep of the limitation on subject-matter jurisdiction in § 17-16-44." ___ So.2d at ___.

This principle controls in the present case. The Working plaintiffs, the Governor and Bowman make no challenge to the manner in which the February 5 special election was conducted or the particular results of that election; the challenge here is to the very holding of the election. It is a challenge to the

election as one "not authorized by law and therefore wholly void." The jurisdictional limitations imposed by § 17-16-44 therefore are not applicable.

III. The Validity of the February 5 Special Election

We turn now to the substantive question presented, the validity of the February 5 special election. Two issues are presented by the parties for our consideration: (1) whether Act No. 784, Ala. Acts 1977, upon which the election was based, is unconstitutional in light of the prohibition of certain local laws imposed by § 105 of the Alabama Constitution of 1901, and (2) whether Act No. 784 has been repealed by § 11-3-1(f). We first turn our attention to the latter issue because an affirmative response to it will make it unnecessary for us to address the constitutionality of a legislative enactment. *See generally, e.g., Lowe v. Fulford*, 442 So.2d 29, 33 (Ala.1983) (" 'Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds. *White v. U.S. Pipe & Foundry Co.*, 646 F.2d 203 (5th Cir.1981).' " (quoting trial court's order)); *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134, 1142 (Ala.1997) (explaining that "because we hold that [the federal statute] does not apply under the facts of this case, it is unnecessary for us to determine any constitutional issue concerning [that statute's] preemption of Alabama's applicable statute of limitations").

We begin our analysis with a brief examination of the decision of this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). At issue in *Stokes* was § 11-3-6, the precursor statute to § 11-3-1(b), the

general law at issue in the present case. At the time *Stokes* was decided, however, § 11-3-6 contained no exception for local laws. It stated simply as follows with respect to a vacancy in a county commission seat:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

This general law was in place when the legislature enacted Act No. 85-237, Ala. Acts 1985. Similar to the local law at issue here, Act No. 85-237 was a local law intended to provide for filling vacancies on a county commission of one particular county, specifically Mobile County, by a special election. Addressing the constitutionality of Act No. 85-237, the *Stokes* Court reasoned that

> "the legislature, by enacting a general law containing no . . . provision or exception for contrary local laws, thereby intended that general law to be primary and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit the enactment of contrary local laws."

Stokes, 534 So.2d at 239 (quoting *Baldwin County v. Jenkins*, 494 So.2d 584, 587 (Ala.1986)(emphasis omitted)). On this basis, the *Stokes* Court declared Act No. 85-237 to be unconstitutional.

Riley v. Kennedy, 928 So.2d 1013 (Ala.2005), dealt with the same local law as did *Stokes*, Act No. 85-237. By the time this Court decided *Riley*, however, the legislature had amended § 11-3-6 to add the beginning proviso "[u]nless a local law authorizes a special election." Act No. 2004-455. The plaintiffs in *Riley* argued that that made all the difference:

> "Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala.Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation."

928 So.2d at 1016. The Court in *Riley* disagreed:

> "This Court has consistently held that
>
> > "'"statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute

> is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984)." ' "

Riley, 928 So.2d at 1016. The Court continued:

> "Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala.Code 1975, provides for *prospective application only*, and that language must be given effect according to its terms. *Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively.* The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is '[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature . . . *to provide* for the manner of filling vacancies in the office of the county commission.' (Emphasis added.) The language *'to authorize the Legislature . . . to provide'* the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies

> prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment."

Riley, 928 So.2d at 1017 (most emphasis added; some emphasis omitted).

The Election Commission and Sheriff Hale argue that the issue in Riley was whether Act No. 2004-455 could "revive" a local act, Act No. 85-237, which previously had been declared unconstitutional in *Stokes*. Act No. 784, they point out, was at no time before the enactment of Act No. 2004-455 judicially declared to be unconstitutional. "It follows," according to the Election Commission and Sheriff Hale, "that Act No. 77-784 does *not* need to be revived. Therefore, the issue before this Court in *Riley v. Kennedy* is not present in this case and the *Riley v. Kennedy* decision is inapposite to this case."

The reasoning unanimously adopted by this Court in *Riley* does not admit of the distinction urged by the appellees. Again, as this Court stated, "the plain language in Act No. 2004-455 . . . provides for prospective application only"; "[n]othing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment [to the general law] apply retroactively," and "the preamble of the Act . . . provides that the purpose of the Act is '. . . *to authorize* the Legislature by local law *to provide*' " for exceptions to the general law. 928 So.2d at 1017.

Thus, in *Riley*, the introductory proviso in § 11-3-6 -- "[u]nless a local law authorizes a special

election" -- was interpreted to apply only to local laws enacted *after* Act No. 2004-455. Approximately two years after this Court's decision in *Riley* was issued, the legislature, in Act No. 2007-488, reenacted the same language -- including the aforesaid proviso -- which had been interpreted in *Riley*. It did so without choosing to make any changes to it (other than to renumber it as § 11-3-1(b)). The Working plaintiffs, the Governor, and Bowman argue that the meaning of this language was decided in *Riley* and that this Court has now but to apply that meaning in the present case. We agree. Other than the renumbering of the section in which this language appears, there has been no change in this language since the decision in *Riley*.

Our agreement with the appellants' position is buttressed by long-established and fundamental principles of statutory construction.

> "[T]here exists, and has long existed, in this state, a principle that when the legislature readopts a code section, or incorporates it into a subsequent Code, prior decisions of this court permeate the statute, and it is presumed that the legislature deliberately adopted the statute with knowledge of this court's interpretation thereof."

Edgehill Corp. v. Hutchens, 282 Ala. 492, 495-96, 213 So.2d 225, 227-28 (1968). *See also, e.g., Galloway Coal Co. v. Stanford*, 215 Ala. 79, 81, 109 So. 377, 379 (1926) (" 'It is a settled rule, that, in the adoption of the Code, the Legislature is presumed to have

known the fixed judicial construction pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction.' *Morrison v. Stevenson*, 69 Ala. 448, [450 (1881)]."); 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.09 (5th ed.1992) (compiling numerous Alabama cases to the same effect). As the Court aptly put it in the early case of *Barnewall v. Murrell*, 108 Ala. 366, 377, 18 So. 831, 836 (1895), it is "an elementary rule of statutory construction" that, where a reenacted statute has previously been construed by the courts, it is "presumed the legislature intended the adoption of that construction, or [it] would have varied the words, adapting them to a different intent." Here, the legislature could have "varied the words" of former § 11-3-6 in an effort to "adapt them to a different intent," but did not.

In accordance with the previous decision of this Court in *Riley v. Kennedy* and based on well-established principles of statutory construction, we conclude that § 11-3-1(b) requires vacancies on a county commission to be filled by gubernatorial appointment and that the proviso at the outset of that subsection (making an exception for local laws that authorize special elections) does not apply retroactively, that is to local laws that predate the legislature's adoption of that proviso. Act No. 784, Ala. Acts 1977, is such a local law.

In 2007, the legislature added subsection (f) to § 11-3-1. *See* Act No. 2007-488, Ala. Acts 2007. Section 11-3-1(f) now expressly repeals local laws in conflict with any other provision of § 11-3-1: "Any existing local law or portion thereof in conflict with

this section is specifically repealed to the extent of the conflict effective with the next election following September 1, 2007." Act No. 784, by purporting to provide for special elections to fill vacancies on the Jefferson County Commission, is "in conflict" with § 11-3-1(b), which requires vacancies to be filled by gubernatorial appointment, with no exception for preexisting local laws. Act No. 784, as a preexisting local law, therefore was repealed by the legislature's adoption of § 11-3-1(f). The trial court's validation of the February 5 special election on the basis that it was authorized by Act No. 784 is due to be reversed.[11]

IV. The Right to a November 2008 Election

McGinnis argues on appeal that he is entitled to an order requiring the Election Commission to include the county commission seat for district 1 on the November 2008 general election ballot. In support of this view, he cites us to the portion of § 11-3-1(b) that provides that "[i]f the appointment [by the Governor to fill a vacancy on a county commission] occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5," a condition that exists in this case, "the person appointed to the vacated office shall only serve until seven days after the next general election following

[11] The Working plaintiffs also contend that Act No. 784 violates their equal-protection rights and that, even if Act No. 784 governed, the Election Commission set the special election on the wrong day. As is true of the issue of the constitutionality of Act No. 784 in relation to § 105 of the Alabama constitution, our holding today makes it unnecessary for us to reach these additional issues.

the appointment . . . ." We also observe that the penultimate sentence of § 11-3-1(b) includes a reference to "the election required by operation of this subsection." Given our ruling today as to the repeal of Act No. 784, McGinnis's understanding of § 11-3-1(b) as it relates to the conduct of an election to fill the vacancy in the Jefferson County Commission is correct.[12] McGinnis seeks a judgment requiring that the election prescribed by § 11-3-1(b) be placed on the November 2008 general election ballot and "such additional orders as may be needed to secure full and appropriate relief consistent with the right of political parties to nominate candidates" for that election. The trial court is instructed to enter an appropriate order declaring that the required election is to be placed on the November 2008 general election ballot. As for the remainder of the relief requested by the appellants, this Court is confident that appropriate officials will take the necessary and appropriate steps as may be called for or allowed in any applicable provisions of Title 17, Ala.Code 1975, and any other applicable law, whether relating to the selection by political parties of nominees or any other aspect of the election process. Nothing herein shall prevent the parties from petitioning the trial court for such further relief as may be necessary and appropriate to fulfill the intent of this Court's judgment.

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[12] The opposition of the Election Commission to placing the county commission seat on the November ballot has been premised on its view that Act No. 784 supersedes the provisions of the general law in this regard.

V. Conclusion

For the reasons discussed, the judgment of the trial court upholding the validity of the February 5 special election on the basis of its conclusion that Act No. 784 authorized that election was in error. The Governor's appointment of George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission was in accordance with § 11-3-1(b) and was lawful. An election for that seat is to be held as part of the November 2008 general election. Accordingly, we reverse the trial court's judgment and remand the cause before us to the trial court for the entry of a judgment consistent with this opinion.

1070850-REVERSED AND REMANDED.

1070893-REVERSED AND REMANDED.

1070917-REVERSED AND REMANDED.

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Murdock, JJ., concur.

U.S. Department of Justice

Civil Rights Division

CC:TFM:DJ:jdh
DJ 166-012-2
2008-1576
2008-3861

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 22, 2008

The Honorable Troy King
Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King:

This refers to the procedures for filling vacancies on the Jefferson County Commission, in Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We received your response to our May 8, 2008, request for additional information on May 27, 2008; supplemental information was received through July 1, 2008.

We understand that on June 30, 2008, the Supreme Court of Alabama issued its decision in *Working v. Jefferson County Election Commission*, ___ So.2d ___, 2008 WL 2569255, which held that the

county commission vacancy caused by the election of Larry Langford as Mayor of Birmingham would be filled initially by gubernatorial appointment, but that subsequently, the unexpired term would be filled by special election by the voters on the November general election date. 2008 WL 2569255, at *11-*12. It noted that this procedure was in accordance with Ala. Code § 11-3-1(b). *Id.*, at *11. According to our records, this change affecting voting effectuated by Ala. Code § 11-3-1(b) has not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. In fact, when the State submitted the underlying legislative act, Act No. 2007-488, which included Ala. Code § 11-3-1(b), for Section 5 review, it specifically excepted Ala. Code § 11-3-1(b) from the changes for which preclearance was being requested. Letter from Troy King, Attorney General, and Winfield Sinclair, Assistant Attorney General, to Chief, Voting Section, Feb. 4, 2008, at 1.

If our information is correct, it is necessary that these changes be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. § 51.10).

Because the change now before us and the unsubmitted change are directly related, they must be reviewed simultaneously. Accordingly, it would be inappropriate for the Attorney General to make a preclearance determination on the instant change until the related change has been submitted for Section 5 review. See 28 C.F.R. §§ 51.22(b) and 51.35.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines. At that time, we will review all changes simultaneously; however, any documentation previously provided need not be resubmitted.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning these matters. If you have any questions, you should call Donald Jacobsen (202-305-8299) of our staff. Refer to File Nos. 2008-1576 and 2008-3861 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of these changes is before the court in *Plump v. Riley*, No. 2:07-cv-01014-MEF-CSC (M.D. Ala.), we are proving a copy of this letter to the court and counsel of record in that case.

Sincerely,
/s/ Timothy Mellett
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DORIS POWELL, Plaintiff, v. THE STATE OF ALABAMA; JEFFERSON COUNTY ELECTION COMMISSION; ALAN KING, MIKE HALE, and ANNE-MARIE ADAMS, in their official capacities as members of the Jefferson County Election Commission, Defendants.	CIVIL ACTION NO.

COMPLAINT

1. This is an action to enjoin violations of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. This action is necessary because the defendants are proceeding to enforce changes in election practices which have not been precleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by either the Attorney General of the United States or the U.S. District Court for the District of Columbia.

Parties

2. Doris Powell is an African-American citizen of Alabama and a registered voter in Commission District 1 of Jefferson County.

3. Defendant State of Alabama is a state that, along with its political subdivisions, is a jurisdiction covered under § 4 of the Voting Rights Act, 42 U.S.C. § 1973b, and thus may not enact or seek to administer any change in voting practice or procedure unless and until it receives preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Congress has abrogated the Eleventh Amendment immunity of the State of Alabama with respect to plaintiff's claims in this action.

4. Defendant Jefferson County Election Commission is by statute responsible for appointing election officials and for canvassing and declaring the results of elections for county offices. Alan King, Probate Judge No. 1 for Jefferson County, Mike Hale, Sheriff of Jefferson County, and Anne-Marie Adams, Jefferson County Circuit Clerk, are the members of the Jefferson County Election Commission by virtue of the offices they hold. They are sued in their official capacities.

Facts

5. The Alabama Legislature adopted Act 784 in the 1977 Regular Session (hereafter "Act 1977-784"), providing that when a vacancy occurs on the Jefferson County Commission, the Election Commission of Jefferson County shall call a special election. A copy of Act 1977-784 is attached as Exhibit A to this complaint.

6. Act 1977-784 has been precleared under § 5 of the Voting Rights Act by the Attorney General of the United States.

7. Act 1977-784 was used to call elections in 1982 to fill two vacancies on the Jefferson County Commission.

8. Jefferson County Commissioner Larry Langford has been elected Mayor of the City of Birmingham. He took office on Tuesday, 13 November 2007. He resigned his seat in District 1 of the Jefferson County Commission, which has a majority-black electorate.

9. The Election Commission called a special election on the first Tuesday in February to fill the vacancy

10. Pursuant to Act 77-784, six candidates properly qualified to have their names placed on the ballot for the February 5, 2008, Special Election. Those candidates were George F. Bowman, William A. Bell, Fred Plump, Orville Ifill, Kamu Afrika and Eric Major.

11. The date of the February 5, 2008, Special Election was submitted to the United States Department of Justice for pre-clearance on November 27, 2007. The United States Department of Justice issued a "no objection" letter to the February 5, 2008, Special Election on January 17, 2008.

12. William A. Bell received slightly more than 56% of the votes cast in the February 5, 2008, Special Election.

13. As required by § 17-12-15, Alabama Code (1975), the Jefferson County Election Commission

was scheduled to meet at 12:00 noon on Friday, February 15, 2008, to certify William A. Bell as the winner of the February 5, 2008, Special Election, to fill the vacancy in Commission District 1 on the Jefferson County Commission.

14. On Thursday, February 14, 2008, the Supreme Court of Alabama enjoined the Jefferson County Election Commission from certifying William A. Bell as the winner of the February 5, 2008, Special Election, pending further orders of the Supreme Court of Alabama.

15. The defendants have complied with the February 14, 2008, injunction of the Supreme Court of Alabama, even though their compliance constitutes a change in voting practice which may not be implemented unless it receives preclearance under § 5 of the Voting Rights Act, and even though said change in voting practice has never been submitted for preclearance.

16. On June 30, 2008, the Supreme Court of Alabama held that "Act No. [1977-]784, as a preexisting local law, . . . was repealed by the legislature's adoption of [Ala. Code] § 11-3-1(f)" in Act 2007-488. Working v. Jefferson County Election Comm'n, __ So.2d __, 2008 WL 2569255 (Ala., June 30, 2008) at *11.

17. The Supreme Court of Alabama further held that § 11-3-1(b), Code of Alabama, which was also amended by Act 2007-488, requires the vacancy on the Jefferson County Commission to be filled, first by gubernatorial appointment, then by a special election during the November 2008 general election, and it instructed the Circuit Court to order that a special election to fill the vacancy on the Jefferson

County Commission be placed on the November 4, 2008, election ballot. Id.

18. On July 25, 2008, the Jefferson County Circuit Court entered an order enjoining the certification of the February special election results, calling a November election for the County Commission District One seat, and setting deadlines for party nominations and independents petitioning for a ballot slot.

19. On July 26, Fred Plump (a party in the *Working* case) filed a motion to amend the Order of July 25 to condition the November election on the preclearance of the failure to certify the February special election and § 11-3-1(b) and (f). The Circuit Court denied that motion on July 28.

20. On July 28, 2008, the State of Alabama made two submissions for preclearance under § 5 of the Voting Rights Act: one letter states, "Specifically, this submission concerns Act No. 2007-488 as it relates to new Ala. Code §§ 11-3-1(b) & (f)" and "Accordingly, the noncertification of the February 5 election is a new practice resulting from the enforcement of new Ala. Code § 11-3-1 (f)." Nevertheless, the State's submission states that "§ 11-3-1(b) is being implemented in Jefferson County now. . . ."

21. The second submission letter stated, "On remand, the trial court has entered an Order to facilitate voting on the County Commission seat this November. **That order is the subject of this preclearance submission.**" (Emphasis in original.)

22. Neither request for preclearance has been granted.

23. Unless and until §§ 11-3-1(b) and 11-3-1(f) have been precleared under § 5 of the Voting Rights Act, Act 1977-784, the last precleared statute prescribing the manner of filling vacancies on the Jefferson County Commission, remains in full force and effect.

24. However, in its submission to the Department of Justice the State has taken the position that, should preclearance be denied, Act 1977-784 cannot be enforced because of the stay issued by the U.S. Supreme Court in Governor Riley's appeal from the judgment in *Plump v. Riley*, __ F.Supp.2d __, 2008 WL 192826 (M.D. Ala., Jan. 22, 2008). The State's position ignores this explicit disclaimer by the Middle District Court in *Plump*: "The court emphasizes that whether Act No. 77-784 is, in fact, unconstitutional under state law, and whether positions on the Jefferson County Commission must be filled by special election or gubernatorial appointment under state law, are questions we do not reach and this opinion should not be understood in any way as reaching." Id. at *3. Thus the issues presented in this action are not pending before the U.S. Supreme Court.

25. However, the U.S. Supreme Court is in recess and cannot be expected to act on Governor Riley's appeal in *Plump* before the first Monday in October. That will be too late to prevent the names of candidates for the District 1 seat on the Jefferson County Commission from being printed on the November 4 general election ballot. That ballot must be certified by September 15, 2008. Consequently, only action by this Court can prevent implementation of the statutory repeal of Act 1977-

784 in the event that preclearance of that repeal is not obtained before September 15.

Claims

26. Defendants are violating § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by administering, without preclearance, a practice different from that in effect in 1977. The plaintiff will be harmed by the failure to preclear the changes in election practices before the November 2008 election, in that implementation of said changes may lead to retrogression of her voting strength as an African American.

Prayer for Relief

A. The plaintiff prays that the Court promptly will convene a three-judge court to hear and decide this matter.

B. The plaintiff prays that the Court will enter a declaratory judgment that until and unless they have received preclearance under § 5 of the Voting Rights Act:

(1) the defendants lack the power to comply with orders of the state courts implementing §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, by placing a special election for District 1 of the Jefferson County Commission on the November 4, 2008, general election ballot, and

(2) the defendants lack the power to comply with the February 14, 2008, injunction of the Supreme Court of Alabama by refusing to certify the results of the February 5, 2008, special election.

C. The plaintiff prays that the Court will grant preliminary and permanent injunctions prohibiting defendants from:

(1) complying with orders of the state courts implementing §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, by placing a special election for District 1 of the Jefferson County Commission on the November 4, 2008, general election ballot, and

(2) complying with the February 14, 2008, injunction of the Supreme Court of Alabama by failing or refusing to certify the results of the February 5, 2008.

D. The plaintiff further prays that the Court will stay entry of the injunctions sought in the preceding paragraph until September 14, 2008, the day before the probate judge's deadline for sending the ballot to the printers for the November 4, 2008, general election, to provide defendants or other appropriate officials of Jefferson County and/or the State of Alabama an opportunity to submit and to obtain preclearance under § 5 of the Voting Rights Act, of §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, and defendants' refusal or failure to certify the results of the February 5, 2008, special election.

E. The plaintiff prays that the Court will order the defendants to pay their reasonable attorneys' fees, costs, and expenses.

F. The plaintiff prays for such other and additional relief as the Court may deem just and equitable.

Submitted by,

/s/ Edward Still

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170

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No. 07-1460

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IN THE

Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,
Appellant,

v.

FRED PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

MOTION TO DISMISS OR TO AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellant's notice of appeal was untimely filed.

2. Whether section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires preclearance when a covered jurisdiction enacts a statute repealing its preexisting law mandating special elections to fill vacancies on a county governing body and replaces it with a provision providing for temporary gubernatorial appointment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

MOTION TO DISMISS OR TO AFFIRM 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. THIS COURT LACKS JURISDICTION TO HEAR GOVERNOR RILEY'S UNTIMELY APPEAL 17

A. The District Court's January 25 Amended Judgment and Its April 16 Order Staying That Judgment Were Both Interlocutory 18

B. Since No Notice of Appeal Was Filed Within the Thirty-Day Timeframe Set Out in 28 U.S.C. § 2101(b), This Appeal Must Be Dismissed for Lack of Jurisdiction 25

II. ALABAMA WAS REQUIRED TO SEEK PRECLEARANCE FOR THE USE OF GUBERNATORIAL APPOINTMENT TO FILL VACANCIES ON THE JEFFERSON COUNTY COMMISSION 26

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 15, 16, 31, 32
Berry v. Doles, 438 U.S. 190 (1978) 7
Brandon v. Prince, 74 So. 939 (Ala. 1917) 28
Catlin v. United States, 324 U.S. 229 (1945) 19, 24
Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 32
City of Lockhart v. United States, 460 U.S. 125 (1983) 7
Clark v. Roemer, 500 U.S. 646 (1991) 12
Collins v. Miller, 252 U.S. 364 (1920) 15, 19
Dunn v. Dean, 71 So. 709 (Ala. 1916) 28
Helvering v. Gowran, 302 U.S. 238, 245 (1937) 32
Johnson v. California, 541 U.S. 428 (2004) 19
Kennedy v. Riley, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), *rev'd*, 128 S.Ct. 1970 (2008) 7, 32
Lopez v. Monterrey County, 519 U.S. 9 (1996) 7
Missouri v. Jenkins, 495 U.S. 33 (1990) 21, 25
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 26
Peddycoart v. City of Birmingham, 354 So. 2d 808 (Ala. 1978) 28
Perkins v. Matthews, 400 U.S 379 (1971) 7, 32
Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 15, 16, 31
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 15, 19, 20, 22
Riley v. Kennedy, 128 S. Ct. 1970 (2008) ..... passim
Riley v. Kennedy, 928 So. 2d 1013 (Ala. 2005) 11
St. Louis, Iron Mountain & S. Railroad Co. v. Southern Express Co., 108 U.S. 24 (1883) 19
Stokes v. Noonan, 534 So. 2d 237 (Ala. 1988) 2, 5, 28

Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494 (M.D. Ala. 1976) (three-judge court) 22
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 14, 25
Working v. Jefferson County Election Comm'n, 2008 WL 2569255 (Ala. June 30, 2008) ..... passim
Working v. Jefferson County Election Comm'n, Civ. Act. No. CV 08-900316 JSV (Jefferson County Cir. Ct. Mar. 18, 2008) 10
Young v. Fordice, 520 U.S. 273 (1997) 32

Statutes

28 U.S.C. § 1257 19
28 U.S.C. § 2101(b) ..... passim
Ala. Act 2004-455 11
Ala. Act 2007-488 ..... passim
Ala. Act 57-429 ..... 4, 30
Ala. Act 77-784 ..... passim
Ala. Code § 11-3-1(b) ..... passim
Ala. Code § 11-3-1(f) 10, 11, 12, 32
Ala. Code § 11-3-6 (1975) 4, 11
Ala. Code § 17-13-5 13
Ala. Code Tit. 12, § 6 (1958) 4, 31
Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973 19
Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c ..... passim

Other Authorities

28 C.F.R. § 51.13(i) 31, 32
Ala. Const. § 105 ..... passim
Fed. R. Civ. P. 54(b) 15, 20, 21
Fed. R. Civ. P. 58 20

Letter from Ala. Ass't Att'y Gen. Misty S. Fairbanks to Chief, Voting Section (July 1, 2008) 8, 14
Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (Feb. 4, 2008) 11
Letter from Bob Riley to George Bowman (Nov. 21, 2007) 5
Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Ass't Att'y Gen. Winfield J. Sinclair, (April 4, 2008). 12
Sup. Ct. R. 18.1 ..... 14, 25

MOTION TO DISMISS OR TO AFFIRM

This case is about whether Alabama must obtain preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, when the state legislature repeals a statute requiring special elections and replaces it with one providing for temporary gubernatorial appointment. In 1977, the Alabama Legislature enacted a law providing for special elections to fill vacancies on the Jefferson County Commission. That legislation was precleared by the Attorney General, as required by section 5, and used twice without controversy to fill vacancies. In 2007, when another vacancy arose on the Commission, Governor Bob Riley (the appellant in this case) refused to follow the 1977 Act and appointed George Bowman to fill the seat for the remainder of the unexpired term. A three-judge district court subsequently held that appellant's use of gubernatorial appointment rather than special election to fill the vacancy constituted a change affecting voting requiring preclearance under section 5.

A month after appellant filed his jurisdictional statement in this case, the Alabama Supreme Court, in a parallel proceeding, confirmed that gubernatorial appointment in fact marks a change in the method for filling vacancies on the Jefferson County Commission. In *Working v. Jefferson County Election Comm'n*, 2008 WL 2569255 (Ala. June 30, 2008), that court found that the Alabama Legislature has repealed the 1977 Act through the normal legislative process. In the course of its opinion, the Alabama Supreme Court rejected the Governor's

contention that he had the right to appoint a commissioner to fill the entire unexpired term in favor of an interpretation of Ala. Code § 11-3-1(b) under which the Governor is now entitled to make a temporary appointment to be followed by special election this coming November. And it expressly declined to address the Governor's claim that the 1977 Act had been rendered unconstitutional by its earlier decision in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988).

The State has not yet submitted new section 11-3-1(b) for preclearance. Indeed, it has expressly refused to do so.

These developments take the situation here decisively outside the "narrow scope" of this Court's holding in *Riley v. Kennedy*, 128 S. Ct. 1970, 1986 (2008). In *Kennedy* this Court identified three factors explaining why the use of gubernatorial appointment to fill vacancies on a different body – the Mobile County Commission – constituted no change despite the presence of a precleared 1985 local act authorizing special elections. All three of those factors are absent here.

First, in *Kennedy*, "the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid" was "critical." 128 S. Ct. at 1986. That judgment, the Court explained, distinguished the situation from the "routine" application of section 5 to situations "requiring a State to administer a law it has repealed" through the political process. *Id.* In this case, by contrast, Alabama's highest court expressly *refused* to declare the 1977 Act unconstitutional and instead found that it had been

repealed – exactly the "routine" circumstance requiring preclearance identified by this Court.

Second, in *Kennedy*, the 1985 Mobile County local law had been "challenged the first time it was invoked and struck down shortly thereafter." *Id.* The court distinguished that case from one in which "a practice [was] invalidated only after enforcement without challenge in several previous elections." *Id.* Here, by contrast, Act 77-784 was enforced without challenge in two previous elections. Indeed, the first challenge to the Act's validity was not filed until January 2008, more than twenty-five years after it had twice been used.

Third, in *Kennedy*, the state court's decision holding the 1985 Act unconstitutional had simply "reinstate[d]" a practice of gubernatorial appointment "identical" to the prior baseline practice. 128 S. Ct. at 1987. This Court emphasized that preclearance "might well have been required" had the state court instead required use of a "novel practice." *Id.* This case, by contrast, undeniably involves the adoption of a new practice differing both from the relevant section 5 baseline – the prior, precleared practice set out in the 1977 local act – and from the practice in force or effect on section 5's coverage date.

If this Court were to reach the merits of appellant's section 5 claim, summary affirmance would be appropriate. But because appellant filed each of his notices of appeal more than thirty days after the interlocutory orders he is challenging, this Court lacks jurisdiction to consider his claims.

STATEMENT OF THE CASE

1. When the Voting Rights Act was passed in 1965, a number of different laws governed how vacancies on Alabama county commissions – the general governing body for the State's 67 counties – were to be filled. There was a general state statute, Ala. Code Tit. 12, § 6 (1958), which served as a default, providing for gubernatorial appointment.[1] But in some counties, vacancies were filled by other procedures pursuant to local acts governing only those counties. In particular, in Jefferson County, vacancies were filled pursuant to a 1957 local act, Act 57-429.[2] That Act called for vacancies to be filled in the manner specified in the general state statute – gubernatorial appointment – but shortened the term of office of the replacement. Rather than serve out the remainder of the unexpired term, the appointed person would hold office only until a successor could be elected in "the next general election for any state officer held at least six months after the vacancy occurs." (Such elections are held in even-numbered years.)

In 1977, the Alabama Legislature passed new legislation governing vacancies on the Jefferson County Commission. Alabama Act 77-784 provided

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[1] Tit. 12, § 6 was later recodified without substantive changes as Ala. Code § 11-3-6 (1975). Its successor, which does contain substantive modifications from the provision in force or effect in 1965, appears in Ala. Code § 11-3-1(b).

[2] The 1957 local act was a "population bill," in that it did not refer to Jefferson County by name, but specified that it was to govern only counties with a population of 500,000 or more. Jefferson County was the only county to meet that description.

that vacancies would be filled exclusively by special election. J.S. App. 44a-49a.

Because Alabama is a covered jurisdiction, section 5 of the Voting Rights Act required the State to obtain preclearance of Act 77-784 before administering the change from temporary appointment to election. Alabama sought, and received, preclearance from the Attorney General. *See* J.S. App. 7a.

Following its preclearance, Act 77-784's special election procedures were used two separate times in 1982 to fill vacancies on the Commission. Neither time did anyone challenge the use of Act 77-784.[3]

Twenty-five years later, in October 2007, the vacancy giving rise to this lawsuit occurred when Larry Langford, the commissioner representing District 1, was elected mayor of Birmingham. After Langford resigned his seat, the Jefferson County Election Commission, pursuant to Act 77-784, adopted a resolution calling for a special election on February 5, 2008 – the date of the presidential primary – to fill Langford's seat. J.S. App. 4a.

In November 2007, however, Governor Riley appointed George F. Bowman to the seat. His

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[3] A third vacancy on the commission, which occurred in 2001, was filled through gubernatorial appointment. The record in this case does not reflect any challenge being brought to the governor's appointment. The district court in this case speculated that the 2001 vacancy was filled by the governor "presumably because of [an intervening Alabama Supreme Court decision in] *Stokes' v. Noonan*, 534 So. 2d 237 (Ala. 1988), J.S. App. 3a, which had struck down a different local law providing for special elections as a violation of Ala. Const. § 105.

appointing letter, which made no reference to Act 77-784, provided that Bowman would fill the entirety of Langford's unexpired term. *See* Letter from Bob Riley to George Bowman, Nov. 21, 2007, Dist. Ct. Docket No. 38, Attach. 2, Exh. Q. Governor Riley made the appointment after appellee filed suit in the district court.

2. Appellee Fred Plump is an African American citizen of Alabama and a registered voter in Jefferson County Commission District 1. In the face of appellant's announcement of his intention to fill the vacancy by appointment, appellee filed suit in November 2007 in the United States District Court for the Middle District of Alabama. In his amended complaint, appellee alleged that the Governor's actions violated sections 2 and 5 of the Voting Rights Act as well as the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The complaint sought both declaratory and injunctive relief.

On January 22, 2008, the three-judge court issued an opinion addressing appellee's motion for a preliminary injunction with respect to his section 5 claims.[4] The court concluded that the use of gubernatorial appointment rather than the special election procedure set out in Act 77-784 constituted a change with respect to a voting practice or procedure requiring preclearance under section 5. Act 77-784, it found, was the applicable baseline. J.S. App. 7a. "The gubernatorial appointment power exercised thereafter was, therefore, a change in practice

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[4] That opinion did not address appellee's section 2 or constitutional claims.

covered under the Voting Rights Act which must be precleared." *Id.* The district court recognized that the situation in Jefferson County was "not identical" to that in Mobile County, J.S. App. 6a, given appellee's argument that the 1977 Jefferson County Act, unlike the 1985 Mobile County Act at issue in *Kennedy*, had never been declared unconstitutional by the Alabama Supreme Court. Still, along with relying on this Court's decisions in *City of Lockhart v. United States*, 460 U.S. 125 (1983), and *Perkins v. Matthews*, 400 U.S 379 (1971), to explain why Act 77-784 was the appropriate section 5 baseline regardless of whether it conformed to other provisions of Alabama law, the district court did point to the reasoning regarding this question in the district court's opinion in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), later reversed by this Court. *See* J.S. App. 6a-7a.

Having found that gubernatorial appointment required preclearance, the district court then considered what relief to order. It granted appellee's request for a declaratory judgment that preclearance was required. J.S. App. 10a. But it denied appellee's request for immediate injunctive relief removing appointed Commissioner Bowman from office. Relying on this Court's decisions in *Lopez v. Monterrey County*, 519 U.S. 9 (1996), and *Berry v. Doles*, 438 U.S. 190 (1978), the district court instead gave the Governor the opportunity either to seek preclearance of the appointment or to advise the court that instead of seeking preclearance, he would file an appeal to this Court. J.S. App. 9a. The district court then announced that the Governor would have until February 5, 2008 – the date of the

already scheduled special election – to inform the court whether he would seek preclearance. If the Governor did not inform the court of his intention to seek preclearance by that date, then the district court directed that "the seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court." J.S. App. 10a. By contrast, if the Governor did announce an intention to seek preclearance, he would be given ninety days to obtain preclearance. If preclearance were not obtained during that time, then the seat would be vacated. *Id.* In its January 22 opinion and order, the district court did not explicitly announce what it would do if appellant simply filed a notice of appeal.

On January 25, 2008, the district court amended its original judgment to provide that if the Governor decided to appeal the January 22 judgment but declined also to seek preclearance, the seat would be vacated on February 5, 2008. J.S. App. 17a.

On February 5, 2008, appellant informed the district court that Alabama would seek preclearance of the exercise of gubernatorial appointment to fill vacancies on the Jefferson County Commission. J.S. App. 31a. The State filed its preclearance submission on March 18, 2008. On May 8, 2008, the Department of Justice requested more information from the State. J.S. 6 n.5. Earlier this month, the State, among other things, notified the Department of Justice that it considered the request "to be both misguided and unreasonable" and accordingly "no response will be provided." Letter from Ala. Ass't Att'y Gen. Misty S. Fairbanks to Chief, Voting Section, July 1, 2008, at 2.

Although the district court's January 25 judgment purported to be a final judgment, the court later revisited what appellant calls its "contingent, springing remedy order." J.S. 6. On April 16, 2008, the district court stayed its January 25 judgment until the earlier of sixty days from the date of the State's preclearance submission or the Attorney General's response to the submission. And the district court "open[ed] the door" to further stay motions in the event the preclearance process took longer than sixty days. J.S. 6 n.4.

Appellant filed his first notice of appeal on March 22, 2008, fifty-seven days after the January 25 judgment. He filed a second notice of appeal on May 20, 2008, 116 days after the January 25 judgment and thirty-four days after the district court's April 16 stay order.

3. Parallel to the proceedings in this case, there was litigation in the Alabama state court system concerning the Jefferson County Election Commission's decision to set a special election for February 5, 2008, to fill Langford's seat.

On January 31, 2008, shortly after the district court's initial decision in this case, two Jefferson County residents filed suit against the Election Commission in the Jefferson County Circuit Court. *Working v. Jefferson County Election Commission*, Civ. Act. No. CV 08-900316 JSV (filed Jan. 31, 2008). The plaintiffs alleged, inter alia, that the February 5, 2008, special election was unauthorized because Act 77-784 violated section 105 of the Alabama Constitution, which prohibits the enactment of a "local law" in "any case which is provided for by a general law." They eventually amended their

complaint to allege that although the February 5, 2008, election would be invalid because of the unconstitutionality of Act 77-784, the Election Commission was required by a different Alabama statute, Ala. Act 2007-488 (codified as Ala. Code § 11-3-1(b)), to hold a special election in November 2008 to replace the Governor's appointee. *See Working v. Jefferson County Election Comm'n*, 2008 WL 2569255, at *2 (Ala. June 30, 2008). Governor Riley intervened in the *Working* litigation as a plaintiff in support of the constitutional challenge and also to argue he was entitled to appoint for the remainder of the unexpired term. Appellee Plump intervened as a defendant to defend the validity of Act 77-784.

The circuit court declined to enjoin the February 5, 2008, election, which was held as planned. On February 14, 2008, however, the Alabama Supreme Court granted an emergency motion filed by the *Working* plaintiffs and enjoined the Election Commission from certifying the results of the election pending a trial on the merits of their claims.[5]

At that trial on the merits, the circuit court upheld Act 77-784 against the claim it violated the prohibition on local laws contained in section 105 of the Alabama Constitution, interpreting Ala. Code § 11-3-1(b) to authorize this form of local legislation. *See Working v. Jefferson County Election Comm'n*,

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[5] According to unofficial tallies, William Bell, who was subsequently added as a party defendant, received a majority of the votes cast, defeating – among the other five candidates – the governor's appointee, George Bowman. *See Working v. Jefferson County Election Comm'n*, Civ. Act. No. CV 08-900316 JSV at 3.

Civ. Act. No. CV 08-900316 JSV at 1, 10 (Jefferson County Cir. Ct. Mar. 18, 2008).

On appeal, the Alabama Supreme Court did not reach that constitutional question. Instead, it held Act 77-784 had been repealed by Ala. Act 2007-488, codified as Ala. Code § 11-3-1(f). *Working* 2008 WL 2569255, at *11. The starting point for the court's analysis was Ala. Code § 11-3-1(b). Section 11-3-1(b) (enacted as part of Ala. Act 2004-455 and originally codified as section 11-3-6) provides, in pertinent part, that "[u]nless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor." In *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), the Alabama court had construed this provision as an explicit approval only for local laws enacted subsequent to 2004. Since Act 77-784 had been enacted decades earlier, the court concluded Ala. Code § 11-3-1(b) did not affirmatively ratify Act 77-784. *Working*, 2008 WL 2569255, at *11.

To the contrary, the Alabama Supreme Court concluded that the Alabama Legislature, in Ala. Act 2007-488 (the operative subsections of which have not been precleared)[6] expressly *repealed* Act 77-784:

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[6] Act 2007-488 enacted a sweeping set of changes in the law governing Alabama county commissions. The State submitted a preclearance request, which specifically identified the particular provisions for which the State sought preclearance. The Department of Justice granted preclearance as to those provisions.

However, the State expressly declined to submit section 11-3-1(b) for preclearance. Nor did it submit section 11-3-1(f), as later interpreted by the Alabama Supreme Court. Rather, the State represented that section 11-3-1(f) did not constitute "a

> Section 11-3-1(f) now expressly repeals local laws in conflict with any other provision of § 11-3-1: "Any existing local law or portion thereof in conflict with this section is specifically repealed to the extent of the conflict effective with the next election following September 1, 2007." Act No. 784, by purporting to provide for special elections to fill vacancies on the Jefferson County Commission, is "in conflict" with § 11-3-1(b), which requires vacancies to be filled by gubernatorial appointment, with no exception for preexisting local laws. Act No. 784, as a preexisting local law, therefore was repealed by the legislature's adoption of § 11-3-1(f).

Working, 2008 WL 2569255, at *11.

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substantive change affecting voting," and requested preclearance only "[t]o the extent that the Department may disagree." Exh. IV of Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section, February 4, 2008, State Sub. No. 2008-0427. Accordingly, the Department of Justice precleared section 11-3-1(f) only "to the extent not inconsistent with the unsubmitted and unprecleared changes in Section 11-3-1, Sections (a) and (b)." Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Ass't Att'y Gen. Winfield J. Sinclair at 2 (April 4, 2008).

Because the preclearance submission did not specifically identify sections 11-3-1(b) and 11-3-1(f) as changes in election practices, and did not specifically request preclearance of those sections, the State has not yet obtained preclearance of either. *See Clark v. Roemer*, 500 U.S. 646, 657 (1991) ("A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.") (quotation omitted).

In light of this construction of the Alabama Code, the court found it "unnecessary" to resolve "the issue of the constitutionality of Act No. 784 in relation to § 105 of the constitution." *Id.* at *11 n.11. But the court did make clear that it, and not the governor, had the sole power to declare a law void under section 105. *See id.* at *5 n.8.

Having resolved the question whether Act 77-784 required a special election, the court then turned to the *Working* plaintiffs' other claim – that Ala. Code § 11-3-1(b) required one. After providing a general authorization of gubernatorial appointment, section 11-3-1(b) further provides that if a gubernatorial appointment occurs early enough in an election cycle,[7] then "the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein." The Alabama Supreme Court construed this section to require a special election here, since Governor Riley's appointment of Bowman occurred within the time frame prescribed by section 11-3-1(b). *Working*, 2008 WL 2569255, at *11. That election, the court held, should occur as part of the November 2008 general election. *Id.* at *12. It therefore rejected the Governor's contention that he was entitled to fill the seat for the entirety of Langford's unexpired term.

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[7] The precise language is "[i]f the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5" of the Alabama Code. Section 17-13-5(a) provides that party qualifying shall occur sixty days before the primary election, which is held on the first Tuesday in June, *id.* § 17-13-3.

On July 1, 2008, the State informed the Department of Justice, before which the preclearance submission regarding the gubernatorial appointment of George Bowman was pending, of the Alabama Supreme Court's decision in *Working*. *See* Letter from Ala. Ass't Att'y Gen. Misty S. Fairbanks to Chief, Voting Section, July 1, 2008. The State acknowledged its initial submission, which had sought preclearance of gubernatorial appointment to fill the remainder of Langford's term (which lasted until 2010) had been overridden by *Working*, but did not seek preclearance of the repeal of Act 77-784 or the adoption and use of Ala. Code § 11-3-1(b). *See id.* at 2.

SUMMARY OF ARGUMENT

I. This appeal should be dismissed for lack of jurisdiction because appellant failed to file timely notices of appeal from the interlocutory orders he is challenging. 28 U.S.C. § 2101(b) requires appeals from interlocutory orders be taken within thirty days. That provision is jurisdictional and cannot be waived. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *accord* Sup. Ct. R. 18.1 ("The time to file [an appeal] may not be extended.").

In this case, appellant seeks review of the district court's amended judgment issued on January 25, 2008. He filed his initial notice of appeal on March 22, 2008, fifty-seven days later. He filed a second notice of appeal on May 20, 2008, 116 days after the January 25 judgment and thirty-four days after the district court had stayed that initial order.

Consequently, neither of these notices of appeal was timely.

Appellant cannot escape this jurisdictional bar by characterizing the January 25 judgment as final or, alternatively, calculating the timeliness of his appeal from various dates on which the judgment, interlocutory when rendered, might have become final had various contingencies occurred. The January 25 judgment addressed only one of the claims presented in appellant's amended complaint and thus cannot be final because it did not resolve all the causes of action presented in the complaint. *See Collins v. Miller*, 252 U.S. 364 (1920); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). Nor did the district court follow the mechanism provided by Fed. R. Civ. P. 54(b) for entering final judgment on a single claim. And even as to the section 5 claim the district court did address, the judgment was not final because it left the timing and nature of the relief in limbo, dependent on several contingencies that to this day remain unresolved. The district court's April 16, 2008, order granting appellant a temporary stay did nothing to resolve the additional claims or bring finality to the section 5 claim. Thus, the only two dates relevant for purposes of measuring the timeliness of appellant's notices of appeal are January 25 and April 16, 2008. Appellant's failure to file a notice of appeal within thirty days after either date deprives this Court of jurisdiction to consider his claims.

II. If this Court does reach the merits, it should affirm the district court's judgment. Section 5 of the Voting Rights Act requires preclearance when a covered jurisdiction shifts from election to

appointment as a means of filling a public office. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). This Court's recent decision in *Riley v. Kennedy*, 128 S. Ct. 1970 (2008), both reaffirmed *Allen* and *Presley* and confirmed that "requiring a State to administer a law it has repealed" unless and until that repeal has been precleared is "a routine consequence of § 5," *id.* at 1986.

This case falls squarely within the scope of section 5 as interpreted in *Allen*, *Presley*, and *Kennedy*. In 1977, Alabama enacted, and received preclearance for, a law providing for special elections to fill vacancies on the Jefferson County Commission. That law – Ala. Act 77-784 – was used twice, without challenge. Special elections thus became the section 5 baseline. Nonetheless, in 2007, a vacancy on the Commission was filled through gubernatorial appointment, rather than by special election. The district court in this case correctly held that the Governor's appointment effected a change in voting practice and therefore required preclearance.

The Alabama Supreme Court subsequently confirmed that the process for filling vacancies on the Jefferson County Commission has indeed been changed from the Act 77-784 baseline. It found that as the result of legislation passed in 2007, the Alabama Legislature replaced Act 77-784, which it described as the "preexisting local law," with a new system involving a mixture of gubernatorial appointment and special election depending on when a vacancy occurs. *Working v. Jefferson County Election Commission*, 2008 WL 2569255, at *11 (Ala. June 30, 2008). Alabama has not obtained

preclearance of the repeal of Act 77-784 or its replacement with the mixed system set out in Ala. Code § 11-3-1(b).

Governor Riley argues that he was not obligated to obtain preclearance before exercising his appointment authority because Act 77-784 violates the Alabama constitution and was therefore void *ab initio*, and because his appointment simply represents a return to the practice in force or effect in 1964. Both arguments are incorrect. In *Working*, the Alabama Supreme Court expressly refused to declare Act 77-784 unconstitutional. Rather, the court described that Act as a "preexisting local law" that governed the filling of vacancies on the Jefferson County Commission until its legislative repeal in 2007. Moreover, as interpreted by Alabama's highest court, the scheme set out in Ala. Code § 11-3-1(b) differs both from the relevant section 5 baseline – Act 77-784 – and from the practice in force or effect on section 5's coverage date. In light of the Alabama Supreme Court's clarification of state law, this case falls in the heartland of this Court's section 5 jurisprudence.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR GOVERNOR RILEY'S UNTIMELY APPEAL.

Direct appeals to this Court must be taken "within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final." 28 U.S.C. § 2101(b). Thus, while Congress contemplates that some direct appeals will

involve interlocutory orders rather than final judgments, it has specifically shortened the time for appealing in such cases.

In this case, appellant filed his initial notice of appeal, seeking review of the district court's January 25, 2008, judgment, fifty-seven days later, on March 22, 2008. J.S. App. 37a. He filed a second notice of appeal from the same judgment nearly two months later than that, on May 20, 2008. J.S. App. 72a.

Both of those notices of appeal were untimely. The district court's January 25 judgment was in fact only interlocutory. It addressed only one of the claims in appellee's complaint. And even as to that claim, the January 25 judgment cannot be treated as final. The timing and nature of the remedy awarded to appellant in the January 25 judgment remained uncertain and in dispute, and in fact remains so to this day. The district court's April 16, 2008, stay did nothing to resolve the additional claims or bring finality to the section 5 claim. Even less, then, can that stay be treated as a final judgment. Thus, any notice of appeal resting on that decision was required to be filed no later than May 16, 2008. The May 20, 2008, notice of appeal was therefore untimely under any theory.

A. The District Court's January 25 Amended Judgment and Its April 16 Order Staying That Judgment Were Both Interlocutory.

1. A decision is "final for purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, Iron Mountain & S.*

Railroad Co. v. Southern Express Co., 108 U.S. 24, 28-29 (1883); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945).[8]

To be appealable as final, a judgment "should be final . . . as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920); *see also Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Johnson v. California*, 541 U.S. 428, 429-31 (2004) (dismissing, for want of jurisdiction, a case in which the California Supreme Court had ruled on only one of petitioner's three claims because the failure to address all the claims meant that its judgment was not "final" within the meaning of 28 U.S.C. § 1257).

By this standard, the district court's January 25 judgment cannot be considered final since it left several causes of action pending. Appellant's amended complaint expressly raised claims under section 2 of the Voting Rights Act and under the Thirteenth, Fourteenth, and Fifteenth Amendments as well as under section 5. Amended Complaint, Dist. Ct. Dock. No. 5. Appellant acknowledges that "the three-judge court did not resolve all the claims in plaintiff's amended complaint." J.S. at 2; *see also* J.S. App. 25a (stating the district court's January 22 judgment "leaves pending several other claims for relief").

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[8] This Court has found it "instructive in interpreting the parallel term 'final' judgment in § 2101(b)" to look at *Catlin* and other cases interpreting the meaning of "final decision" with respect to 28 U.S.C. § 1291, which governs appeals from district courts to courts of appeals. *Kennedy*, 128 S. Ct. at 1981 n.5.

The district court's January 22 opinion and its January 25 order did not even mention, let alone resolve, those claims. Instead, the district court deferred consideration of those additional federal claims pending the outcome of the State's application for preclearance. If the Department of Justice interposes an objection, those claims will be moot, since the district court will vacate Bowman's appointment. If, on the other hand, the State were to obtain preclearance or this Court were to hold for some reason that preclearance is not required, then the other statutory and constitutional claims would remain live and appellant would be entitled to have them adjudicated. Therefore, the *case* was not terminated by the January 25 judgment. Rather, the ultimate resolution of this litigation depends in part on a contingency. *See Republic Natural Gas Co.*, 334 U.S. at 71 (deeming lower court judgment non-final where "the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation").

The interlocutory nature of the January 25 judgment cannot be altered by the district court's characterization. The court's order that the judgment be docketed as final pursuant to Fed. R. Civ. Pro. 58, J.S. App. at 17a, does not change its lack of finality. As this Court recently reaffirmed in *Riley v. Kennedy*, "[t]he label used by the District Court . . . cannot control [an] order's appealability." 128 S. Ct. at 1981 (quotation omitted).

Fed. R. Civ. P. 54(b) provides the only mechanism for entering a final judgment resolving fewer than all of the plaintiff's claims. That rule states that, in cases involving multiple claims, a

court may direct entry of a final judgment as to one or more but not all of the claims "only if the court expressly determines that there is no just reason for delay." The district court made no such determination in this case, as appellant candidly acknowledges, J.S. 2.

The availability of Rule 54(b) and the availability of review of even interlocutory orders under 28 U.S.C. § 2101(b) undercut appellant's suggestion that this Court should strain to construe a partial judgment as final in order to reach an important legal question. The law provided appellant a straightforward opportunity to appeal the district court's judgment, as long as he filed his notice of appeal within thirty days. He did not do so. Section 2101(b) does not admit of any circumstances in which a clear failure to meet its timeliness requirements may be excused. *Cf. Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (interpreting the parallel language in § 2101(c) as "mandatory and jurisdictional," providing this Court with "no authority to extend the period for filing except as Congress permits"). Indeed, the requirement for timely notice of appeal serves a particularly important function in the context of section 5 coverage litigation. It forces a defendant to decide promptly whether to appeal a finding of coverage, seek preclearance, or do both, rather than allowing the defendant to delay by first pursuing one course and then, if unsuccessful, the other. The thirty-day limit on the filing of a notice of appeal thus ensures that challenges to voting practices are resolved quickly and efficiently.

2. Appellant suggests that the district court's failure to address all the causes of action in appellee's complaint is somehow irrelevant because the other claims would be heard by a single-judge court. *See* J.S. at 3.[9] But he points to no authority for the proposition that a judgment resolving fewer than all of the plaintiff's claims somehow becomes final – rather than simply serving as a basis for interlocutory review – because some of the claims are to be considered by a different-sized panel. He has thus failed to meet his burden of affirmatively establishing this Court's jurisdiction. *See Republic Natural Gas Co.*, 334 U.S. at 71 ("The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction.").

3. Even considering appellee's section 5 claim alone, the three-judge district court's January 25 judgment fails to meet the necessary standard of finality. The district court chose "to afford [Governor Riley] an opportunity to seek federal approval *before ordering relief*." J.S. App. 9a (emphasis added) (quotation omitted). The district court granted declaratory judgment in favor of the plaintiff, but created what appellant rightly recognizes as a "curious" remedial scheme, J.S. 2, that "can only be

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[9] In support of this argument, he cites conflicting authority from other jurisdictions addressing the question whether a three-judge court can hear claims for which a three-judge court is not required. J.S. at 3. Appellant omits, however, a prior decision in the district where this case arose holding that a three-judge court does have discretion to consider all the claims in a lawsuit before it. *See Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 500 (M.D. Ala. 1976) (three-judge court).

described as contingent, springing injunctive relief," *id.* at 4. It allowed the State two weeks to decide whether to seek preclearance, file an appeal to this Court, or do both, and depending on the State's choice and the playing out of the preclearance process purported to order the commission seat vacated sometime between February 5, 2008, and never.

The January 25 judgment thus left the timing and nature of plaintiff's remedy in limbo, contingent upon both Governor Riley's future course of action and the State's ability to obtain preclearance. As appellant acknowledges, "the court's remedy was that the Governor's appointment might be vacated on February 5, 2008, or it might be vacated on April 21, 2008 (90-days from January 22, 2008), or it might not be vacated at all." J.S. at 5. Like the judgment this Court deemed interlocutory in *Kennedy*, the remedial orders in this case did not "conclusively settl[e] the key remedial issue" because, "[f]ar from requiring the Governor to seek preclearance, the District Court expressly allowed for the possibility that he would elect not to do so." 128 S. Ct. at 1981.

While the district court's contingent remedies may have been designed to minimize the likelihood that the court would need to act again on the section 5 claim, they did not foreclose that possibility. Indeed, on April 16, 2008, more than two months after issuing its purportedly final judgment, the district court modified that judgment in response to appellant's April 8, 2008, motion for a stay pending appeal. The decision to grant the stay was not merely "ministerial," for it altered the very substance of the district court's January 25 judgment by

keeping Bowman in office for an additional period of time. It therefore cannot be said that the order "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. at 233.

Recognizing the uncertain status of the January 25 judgment, the Jurisdictional Statement offers a series of dates on which the district court's judgment on the section 5 claim might conceivably have become final. It concludes that the two notices of appeal were timely filed "to the extent that the court's judgment was final on any of these dates." J.S. at 5, 7. But appellant fails to recognize that the district court's judgment *never* achieved finality. The district court's judgment provided that *either* Alabama would obtain preclearance for the appointment of General Bowman, *or* the appointment would be vacated. As a result of the stay granted by this Court on April 18, 2008, neither of those contingencies has yet occurred. The Jurisdictional Statement thus measures the timeliness of this appeal against every yardstick except the one that matters: the district court's non-final, interlocutory order that went into effect on January 25, 2008.

4. The district court's April 16, 2008, order entering a stay of its January 25 judgment was equally interlocutory. Like the earlier order, the April 16 stay left the timing and nature of relief owed to the plaintiff in limbo. Its only effect was to modify the dates on which the contingent remedies might take effect. As appellant notes, after the April 16 order, "the Governor's appointment might have been vacated at any time between April 21, 2008 (the

judgment's original deadline) and May 19, 2008 (the final date authorized by the district court stay), depending on when and how the United States Department of Justice acted." J.S. 6. This Court's grant of a stay pending appeal two days later precluded that order from going into full effect.

B. Since No Notice of Appeal Was Filed Within the Thirty-Day Timeframe Set Out in 28 U.S.C. § 2101(b), This Appeal Must Be Dismissed for Lack of Jurisdiction.

Under 28 U.S.C. § 2101(b), appeals must be taken from interlocutory judgments within thirty days. Appeals not taken within the period set by § 2101(b) are jurisdictionally out of time. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 149 & n.24 (1980); *accord* Sup. Ct. R. 18.1 ("The time to file [an appeal] may not be extended."); *cf. Missouri v. Jenkins*, 495 U.S. at 45 (describing a parallel time limit in another subsection of § 2101 as "mandatory and jurisdictional").

Appellant did not file his first notice of appeal within thirty days of January 25, 2008. His second notice of appeal was not filed within thirty days of either January 25, 2008, or April 16, 2008. Accordingly, his appeals are untimely and should be dismissed for lack of jurisdiction.

II. ALABAMA WAS REQUIRED TO SEEK PRECLEARANCE FOR THE USE OF GUBERNATORIAL APPOINTMENT TO FILL VACANCIES ON THE JEFFERSON COUNTY COMMISSION.

The Jurisdictional Statement in this case has been overtaken by events. Appellant's argument as to why the district court erred depends on his view that Act 77-784 was unconstitutional as a matter of state law and thus, even though the Act had been precleared and actually used at least twice to fill vacancies through special elections, was void *ab initio* and could not serve as a baseline under section 5. It further depends on his assertion that the appointment authority he would use marks a return to the practice in force or effect in 1964.

The Alabama Supreme Court's decision in *Working v. Jefferson County Election Commission*, __ So.2d __, 2008 WL 2569255 (Ala. June 30, 2008) undercuts both of these assumptions.[10] Presented with an opportunity to hold Act 77-784 unconstitutional, the court squarely refused to do so. Instead, it held that the Alabama Legislature in a simple legislative act had repealed Act 77-784. And having found that Act 77-784 had been repealed by Act 2007-488, the Alabama high court concluded that *that* legislation, codified in Ala. Code § 11-3-1(b), and not the 1977 local act, should govern how the vacancy should be filled. Because the provisions of Act 2007-488 that effected the repeal clearly require,

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[10] The Alabama Supreme Court is, of course "unquestionably 'the ultimate exposito[r] of state law.'" *Kennedy*, 128 S. Ct. at 1985 (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)).

but have not obtained, preclearance, this case falls squarely within the "routine consequence of § 5" that a state must "administer a law it has repealed," unless and until it receives preclearance of the new law. *Riley v. Kennedy*, 128 S. Ct. at 1986. In light of Alabama's clarification of its own law, a straightforward application of this Court's section 5 jurisprudence dictates that the district court's holding should be affirmed.

1. Appellant's attempt to use gubernatorial appointment rather than special election to fill the vacancy on the Jefferson County Commission effected a change to the voting practice then in force or effect in Jefferson County. Prior to the appointment in this case, Ala. Act 77-784, a statute providing for special elections, had governed the filling of vacancies on the Commission. Act 77-784 was enacted and precleared in 1977, and was invoked twice in 1982 to fill vacancies on the Commission. *See* J.S. App. 2a-3a; 6a-7a. Its use to fill those seats was never challenged. The district court thus correctly held that Act 77-784 was the section 5 baseline.

Those facts bring this case into sharp contrast with *Kennedy*. Unlike the local act at issue in *Kennedy*, Act 77-784 has never been declared unconstitutional by the Alabama Supreme Court. *See* J.S. App. 6a. In fact, Act 77-784 had never been the subject of any legal challenge until several individuals contested the legality of the February 5, 2008, special election in Jefferson County, over twenty-five years after the Act was twice used to fill vacancies and after the district court's decision in this case.

The Alabama Supreme Court's decision in *Working* confirms that Act 77-784 was not invalid *ab initio*, in contrast to the local act in *Kennedy*.[11] The plaintiffs in *Working*, joined by Governor Riley, had argued that Act 77-784 violated section 105 of the Alabama Constitution.

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[11] Under Alabama law, Act 77-784 stood in a different relationship to Ala. Const. § 105 than did the Mobile County local act at issue in *Kennedy*. Act 77-784, unlike the 1985 Mobile law, was enacted before the Alabama Supreme Court's decision in *Peddycoart v. City of Birmingham*, 354 So. 2d 808 (Ala. 1978). *Peddycoart* interpreted § 105 to "prohibit[] the enactment of a local act when the subject is already subsumed by the general statute." *Id.* at 813. Recognizing that *Peddycoart* marked an explicit change in its interpretation of § 105, the Alabama Supreme Court expressly declared that its new interpretation would apply only prospectively to laws enacted after the decision – that is, to post-1978 laws. As to all laws then on the books, the Alabama Supreme Court directed that they continue to be governed by pre-*Peddycoart* standards. *Id.* at 814-15. Under those standards, Act 77-784 poses no constitutional difficulty. *See, e.g.*, *Brandon v. Prince*, 74 So. 939 (Ala. 1917) (holding that a local act providing for a different manner of jury selection in Tuscaloosa County than provided by general law did not violate Ala. Const. § 105); *Dunn v. Dean*, 71 So. 709 (Ala. 1916) (holding that a local act providing for the Conecuh County Commission to be composed of more members elected in a different way than that provided by general law did not violate Ala. Const. § 105).

By contrast, the Mobile County local act providing for special elections, Act 85-237, was enacted in 1985, seven years after the *Peddycoart* decision. Because this post-*Peddycoart* local act conflicted with the general state statute providing for gubernatorial appointments, the Alabama Supreme Court held in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), that it violated section 105 and was therefore unconstitutional. The *Stokes* decision did not revisit *Peddycoart's* temporal bifurcation of section 105 judicial standards and therefore did not affect the validity of the many local acts enacted prior to *Peddycoart*.

But in its opinion the Alabama Supreme Court declined to address the constitutionality of Act 77-784. 2008 WL 2569255, at *11 n.11.[12] Instead, the court described Act 77-784 as a "preexisting local law" governing vacancies on the Jefferson County Commission that was later repealed by the state legislature. *Id.* at *11. According to the court, Act 2007-488 supplanted Act 77-784 with a provision calling for at least temporary gubernatorial appointment to fill vacancies. *Id.*

The Alabama Supreme Court's *Working* decision confirms that a straightforward application of section 5 requires submission for preclearance here. Act 2007-488 repealed the "preexisting local law" that served as Jefferson County's section 5 baseline, a law precleared in 1977 and twice invoked without challenge. The 2007 Act, as interpreted by the Alabama Supreme Court, changes the voting practice in Jefferson County from special election to (at least temporary) gubernatorial appointment. Governor Riley's appointment on November 21, 2007, implemented this change in voting practice mandated by the Alabama legislature.

Nor is this a case in which appellant can argue that his appointment of Bowman returns to a provision for filling vacancies on the Commission that is "identical," *Kennedy*, 128 S. Ct. at 1987, to

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[12] The court made clear that the authority to declare a local act void under Ala. Const. § 105 rests exclusively with the courts. *Working*, 2008 WL 2569255, at *5 n.8 ("§ 105 affirmatively directs the judicial branch to decide disputes under that provision."). Governor Riley thus had no authority to ignore Act 77-784 on the basis of his own determination that it was unconstitutional.

the one "in force or effect on November 1, 1964," Alabama's section 5 coverage date, 42 U.S.C. §1973c(a). Ala. Act 57-429, which governed vacancies on the Jefferson County Commission, permitted a gubernatorial appointee to remain in office for the entire unexpired term only if the "vacancy occur[red]" within six months of the next general election. Otherwise, a special election was required. By contrast, section 11-3-1(b) looks to when a governor makes his "appointment" – and *not* to when the vacancy occurs – to determine whether a special election will be required, and it uses a far earlier dividing line to determine whether a special election is required.[13] Thus, section 11-3-1(b) not only changes the length of appointees' potential terms in office, but it is open to a form of gubernatorial manipulation through delay that did not exist under the 1957 local act.[14] Section 5

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[13] The 2007 Act looks at whether "the appointment occurs" at least a certain time before the next general election to set the dividing line between permanent and temporary gubernatorial appointment. Special election is required if the appointment occurs "at least 30 days before the closing of party qualifying." Ala. Code § 11-3-1(b). This trigger date is approximately eight months before the general election (because party qualifying occurs sixty days before the primary election, Ala. Code § 17-13-5(a), which is held on the first Tuesday in June, *id.* § 17-13-3, which is approximately five months before the general election held on the first Tuesday after the first Monday in November, *id.* § 17-14-3). Thus, the 2007 Act permits gubernatorial appointment for an entire unexpired term under circumstances where the 1957 Act would have required a special election.

[14] In this case, for example, appellant purported to appoint Bowman to serve Langford's entire unexpired term – that is, until 2010 – despite section 11-3-1(b)'s command for a special election in 2008.

requires preclearance "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer" a voting-related practice "different from" the baseline. Here, the Alabama Legislature "enact[ed]" a change in how vacancies will be filled, and Governor Riley has "[sought] to administer" an even more dramatic one.

Under this Court's section 5 decisions, the state legislature's repeal of Act 77-784 and the Governor's decision to use appointment rather than election require preclearance. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that when the selection of "an important county officer" is "made appointive instead of elective" the "power of a citizen's vote is affected." *Id.* at 569. "Such a change," the Court noted, "could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny." *Id.* at 570. In *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-03

Because the 1957 and 2007 systems provide for different terms of office, a direct transition from the former to the latter would have undeniably constituted a change requiring preclearance. *See* 28 C.F.R. 51.13(i) (requiring preclearance of "[a]ny change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices)"). Act 2007-488 therefore cannot be characterized as a return to the practice in force or effect on Alabama's coverage date.

And, needless to say, the 2007 Act also does not represent a return to the "identical" practice provided for by the default state law in effect in 1964, since Ala. Code Tit. 12, § 6 (1958) provided for gubernatorial appointment to fill an entire unexpired term, while the 2007 Act creates a hybrid system.

(1992), this Court reaffirmed that changes from election to appointment remain one of four paradigmatic "typologies" requiring preclearance. *See also Kennedy*, 128 S. Ct. at 1982 (describing it as undisputed that a 'change' from election to appointment is a change 'with respect to voting' and thus covered by § 5"). The Department of Justice's regulations have also consistently recognized that section 5 covers "[a]ny change in the term of an elective office or an elected official or in the offices that are elective," including "changing from election to appointment." 28 C.F.R. § 51.13(i).

There is no question that Act 77-784 is the section 5 baseline in Jefferson County, because it has been "the procedure in fact 'in force or effect,'" *Perkins v. Matthews*, 400 U.S. at 395, and – after the *Working* decision – that baseline practice of special elections cannot be dismissed as a "temporary misapplication of state law," *Young v. Fordice*, 520 U.S. 273, 282 (1997). Thus, in light of *Allen*, Alabama was required to obtain preclearance before implementing Act 2007-488. Because preclearance has not been obtained with respect to sections 11-3-1(b) and 11-3-1(f), Governor Riley's appointment of General Bowman to the Jefferson County Commission was unlawful under section 5.

2. To be sure, the district court's *reasoning*, as opposed to its result, rested in significant part on the since-reversed decision in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006). But "[i]n the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302

U.S. 238, 245 (1937); *see also Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."). Accordingly, a summary affirmance here would resolve only the question whether the district court's judgment was correct.

It undoubtedly was. The clarification of state law provided by the Alabama Supreme Court's decision in *Working* confirms the district court's holding that the use of gubernatorial appointment to fill an unexpired term on the Jefferson County Commission – either permanently or temporarily – constitutes a change in voting. Thus, this Court should summarily affirm the judgment in this case.

Of course, the district court did not have the benefit of the Alabama Supreme Court's clarifying opinion in *Working* when it reached its decision. If this Court were to conclude that resolution of the section 5 issue in this case for some reason requires additional consideration in light of *Kennedy* and *Working*, then the appropriate course of action might be to note probable jurisdiction and remand the case to the district court to more fully develop the record in light of those opinions.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for lack of jurisdiction or, in the alternative, the district court's judgment should be affirmed.

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107

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Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,
Appellant,

v.

FRED PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF 1

STATEMENT 1

ARGUMENT 3

IF THIS COURT HAS JURISDICTION OVER THIS CASE, IT SHOULD DISMISS THE APPEAL AS MOOT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001).....4, 5

Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969)..... 3, 4

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994).....5

Working v. Jefferson County Election Comm'n, 2008 WL 2569255 (Ala. June 30, 2008).....1, 2, 4

Statutes

Ala. Act 77-784 .....1, 2, 4

Ala. Code § 11-3-1.....2, 3, 4

28 U.S.C. § 2101(b).....3

Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973(a).....1, 4, 5

Other Authorities

Gressman, Eugene, et al., Supreme Court Practice (9th ed. 2007).....3

Letter from Christopher Coates to Troy King (July 22, 2008) 2

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

STATEMENT

This case involves an appeal from a district court decision holding that, before Alabama could abandon a 1977 local act (Ala. Act 77-784) providing for special elections to fill vacancies on the Jefferson County Commission, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), required the State to obtain preclearance for the new practice. Initially, Alabama took the position that the Governor had the power to appoint a replacement commissioner for the remainder of the unexpired (four-year) term because the use of appointment rather than election involved no change within the meaning of Section 5. But after the district court decision in this case was rendered and appellant had filed his jurisdictional statement, the Supreme Court of Alabama held that the state had in fact repealed Ala. Act 77-784 by enacting new statewide legislation providing for *temporary* gubernatorial appointment followed by a special election. *Working v. Jefferson County Election Comm'n*, 2008 WL 2569255 (Ala. June 30, 2008).[1] Appellee has filed a Motion to Dismiss or Affirm (MDA), arguing both that this Court lacks jurisdiction because the appeal is untimely and that, if there were jurisdiction, this Court should affirm the judgment below.

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[1] The Alabama Supreme Court's decision is reprinted in Appellant's Brief in Opposition to the Motion to Dismiss (BIO) at 6a.

The State, pursuant to the ruling from the three-judge district court that is the subject of this appeal,[2] filed a preclearance submission with the Department of Justice on March 18, 2008, and provided an additional response on July 1, 2008. See MDA at 8.

On July 22, 2008, Christopher Coates, the Chief of the Voting Section of the Department of Justice sent a letter to Alabama Attorney General Troy King regarding the preclearance submission made by the State. The Department had concluded that "it would be inappropriate for the Attorney General to make a preclearance determination" with respect to Alabama's submission in light of the fact that the Alabama statutes interpreted in the *Working* decision involved a "directly related" but "unsubmitted change." BIO 1a.

The "unsubmitted change" concerned recently adopted amendments to Ala. Code § 11-3-1 – specifically subsections (b) and (f). In *Working,* the Alabama Supreme Court held that these two subsections had repealed Ala. Act 77-784 (the provision for special elections in Jefferson County) and had substituted a uniform statewide law providing for the filling of vacancies on county commissions by gubernatorial appointment only until the next biennial election. The Alabama Supreme Court did not hold that the Act 77-784 was unconstitutional under the state Constitution, as the

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[2] The district court ordered the removal of the Governor's appointee unless the Governor appealed to this Court or filed for preclearance by a time certain. See MDA at 7-8; JS at 14a-15a. In addition, the district court granted a declaratory judgment in appellee's favor. On April 18, 2008, this Court granted a stay of the district court's judgment.

Governor had argued, but instead held that it was a "preexisting local law" which had been repealed. *See* MDA at 11-13.

On July 28, 2008, the State submitted additional information to the Justice Department in the form of a request for preclearance of the amendments to Ala. Code § 11-3-1(b) and (f). That submission received preclearance on September 15, 2008.[3]

Thus, the state has now complied completely with the district court's order in this case – by obtaining preclearance for the change in voting law that state law has made. There is nothing left for this Court to resolve.

ARGUMENT

IF THIS COURT HAS JURISDICTION OVER THIS CASE, IT SHOULD DISMISS THE APPEAL AS MOOT.

For the reasons stated in appellee's Motion to Dismiss or Affirm, this Court should dismiss the appeal in this case because the notice of appeal was not timely filed. *See* MDA at 17-25. But if this Court were to conclude that the notice of appeal was filed within the thirty days provided for by 28 U.S.C. § 2101(b), it should dismiss the appeal as moot.

A case becomes moot when "the statute that is the basis for the action is repealed or if the challenged conduct is modified." Eugene Gressman et al., Supreme Court Practice § 193, at 926 (9th ed. 2007); *see also Thorpe v. Housing Auth. of Durham*,

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[3] A copy of that letter has been provided to the Court by the Department of Justice.

393 U.S. 268, 282 (1969) (explaining that the same analysis of mootness applies "where the change was constitutional, statutory, or judicial"). As this Court explained in *City News & Novelty, Inc. v. City of Waukesha,* 531 U.S. 278, 283-284 (2001), when a party withdraws its plans to continue the challenged conduct, the appeal becomes moot even if the underlying judgment remains appropriate.

In this case, appellee's complaint challenged the Governor's assertion of the right to fill an unexpired term on the Jefferson County Commission through appointment. It alleged that before any change could be made from the practice of special elections provided for in Ala. Act 77-784, Section 5 of the Voting Rights Act required the State to obtain preclearance. The district court agreed. J.S. App. 10a. The State, pursuant to a state supreme court decision, has changed its practice, and the State has now obtained preclearance for its changed practice.

Thus, appellee has received what he sought in his complaint: compliance with Section 5's preclearance requirement. Moreover, having sought and obtained preclearance from the Department of Justice, the State is now seeking nothing of substance from this Court. Indeed, the State cannot seriously argue, in light of the Alabama Supreme Court's decision in *Working* and its supplemental Section 5 submission, that any decision of this Court would make any practical difference. Given the Alabama Supreme Court's decision in *Working*, the State's subsequent submission of the change required by *Working*'s interpretation of Ala. Code § 11-3-1(b) and (f), and the Department of Justice's preclearance of that change, even if this Court were

to reverse the judgment of the district court, Alabama would continue to be barred from adopting the practice covered by the district court's judgment – gubernatorial appointment to fill the entire unexpired term – because adopting that practice would now constitute an unprecleared change covered by Section 5.

In light of the fact that this case is now moot, the only remaining question is how to dispose of the State's jurisdictional statement. When a party before this Court has "left the fray as a loser, not a winner," it is entirely appropriate for this Court to "dismiss the petition" (or the appeal), "leaving intact the judgment below." *City News & Novelty,* 531 U.S. at 284. Similarly, in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994), this Court explained that it is appropriate to leave in place an existing judgment, even if the appeal has become moot, where the judgment is

> simply unreviewed by [the loser's] own choice. The denial of vacatur is merely one application of the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

Id. at 25. Here, the State could have preserved its claim that it was not required to seek preclearance by simply awaiting a judgment from this Court on its pending appeal. (Indeed, this Court had stayed the district court's judgment to preserve the status quo pending resolution of the appeal.) Instead, after repeated delays and an intervening decision by its own supreme court, Alabama complied with its preclearance obligations by seeking and obtaining

approval for a switch in its system for filling vacancies on the Jefferson County Commission. At this point, nothing the State might obtain from this Court by way of a decision would change, in the slightest respect, the way in which it fills seats on the Commission. Accordingly, this Court should dismiss the State's jurisdictional statement, leaving intact the judgment below.

CONCLUSION

For the foregoing reasons, if the Court does not grant appellee's earlier-filed motion to dismiss or affirm, the Court should dismiss this appeal as moot.

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164

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In the

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HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

SUPPLEMENTAL BRIEF OF GOVERNOR BOB RILEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF IN OPPOSITION 1

1. The original narrow focus of this case was whether Governor Riley's appointment was a "change" for purposes of Section 5. 1

2. In light of the curious order entered by the District Court and several important events which occurred after the District Court entered its judgment, it is not clear what would happen to Commissioner Bowman if this Court were to vacate its stay and dismiss this appeal, while leaving the District Court's judgment in place; for this reason, this appeal may not yet be moot. 3

3. Even if this appeal were moot today, it is not because Governor Riley is the "loser" who has "left the fray," such that leaving the District Court's Judgment in place would be proper. 8

CONCLUSION 12

APPENDIX

Letter from Christopher Coates, Chief, Voting Section, to Ala. Att'y Gen. Troy King and Ala. Ass't Att'y Gen. Misty Fairbanks (September 15, 2008) 1a

Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008) 4a

TABLE OF AUTHORITIES

Cases

City News & Novelty, Inc. v. City of Waukesha,
531 U.S. 278 (2001) 9

Riley v. Kennedy,
553 U.S. ___, 128 S.Ct. 1970 (2008) 1, 10

Riley v. Kennedy,
928 So.2d 1013 (Ala. 2005) 2

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 (1944) 10

Stokes v. Noonan,
534 So.2d 237 (Ala. 1988) 2

U.S. Bancorp. Mortgage Co. v. Bonner Mall Partnership,
513 U.S. 18 (1994) 9-10

Working v. Jefferson County Election Commission,
___ So.2d ___, 2008 WL 2569255
(Ala. June 30, 2008) ..... *passim*

Constitutional Provisions

Ala. Const. Art. IV, § 105 2

Statutes and Acts

28 C.F.R. § 51.35 9

Ala. Act No. 77-784 ..... *passim*

Ala. Act No. 2007-488 ..... 4, 6, 10

Ala. Code § 11-3-1(d) 7

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ..... *passim*

Other Authorities

Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* Supreme Court submission) ..... *passim*

Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission) 5-7

Letter from Christopher Coates, Chief, Voting Section, to Ala. Att'y Gen. Troy King and Ala. Ass't Att'y Gen. Misty Fairbanks (September 15, 2008) ..... *passim*

Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008) ..... *passim*

Powell v. State of Alabama, Civil Action No. 2:08-CV-01345-LSC (N.D. Ala. 2008) (three-judge court).....5-6

Working v. Jefferson County Election Commission, Civil Action No. CV-2008-900316 (Jefferson County Circuit Court, 2008).....5-6

SUPPLEMENTAL BRIEF IN OPPOSITION

Plump's Supplemental Brief in support of his Motion to Dismiss or to Affirm is best understood as an effort to better his chances to recover attorneys' fees. Plump suggests that the appeal should be dismissed without vacating the judgment of the District Court because (i) this appeal is now moot and (ii) it is somehow Governor Riley's fault that the appeal is moot. It is not entirely clear that the appeal is moot at this time, though it will become so at least by November. In any event, the mooting of this litigation—whenever it occurs—is not through any fault of the Governor. The Governor took no voluntary action that would have lead to the mooting of this case; everything he did was required of him either by the federal court or by federal law.

Events continue to unfold. The District Court's judgment was made without the benefit of this Court's opinion in *Riley v. Kennedy*, 553 U.S. ___, 128 S.Ct. 1970 (2008), without the benefit of an Alabama Supreme Court decision concerning the validity under Alabama law of the practice Plump challenges, and without the views of the Department of Justice (DOJ) expressed just last week. The judgment was also made in error when the purported baseline was an unconstitutional practice, when the challenged practice was in force or effect on Alabama's coverage date, and when the District Court had only a motion for preliminary injunction before it. The appropriate action now is not to leave the District Court's judgment in place, but instead to vacate and remand.

1. The original narrow focus of this case was whether Governor Riley's appointment was a "change" for purposes of Section 5. Plump filed

this action asking that Governor Riley's appointment be vacated, if not precleared. The focus of the case is, and always has been, on whether an appointment could be made at all, not on how long the appointee will serve. This distinction is relevant to the question of whether the District Court's judgment should be vacated: As discussed below, the appointment was ultimately precleared, but not because of Plump's efforts or because Governor Riley gave up on his positions in this case, and preclearance may not end the litigation.

In the District Court, Plump argued that the appointment was a "change" for purposes of Section 5 because the practice of filling vacancies by gubernatorial appointment was different from the practice he claimed to be the baseline, namely special election as required by a 1977 local law (Act No. 77-784). Governor Riley contended, and continues to contend, that preclearance is not required because gubernatorial appointment was the coverage-date practice and because the 1977 local law violated Section 105 of the Alabama Constitution, *see Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988); *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005).

The District Court entered a judgment declaring that Governor Riley's appointment must be precleared. The relief ordered by the District Court put Governor Riley in a box: He could immediately appeal the judgment, in which case the appointment would be vacated; he could do nothing, in which case the appointment would be vacated; or, he could seek preclearance, in which case Commissioner Bowman would remain in office while DOJ considered the preclearance submission. *See* Amended Judgment, JS at 17a.

Governor Riley chose the only option that would preserve the *status quo*. The State made a peclearance submission, while maintaining the Governor's position that preclearance was not required. *See* Doc. No. 38.[1] Some time after the preclearance submission was made, and while it was pending, the Governor timely filed his notice of appeal. *See* JS at 37a, 72a. Governor Riley also sought a stay pending appeal, and that stay is what has kept his appointee in office.[2]

2. In light of the curious order entered by the District Court and several important events which occurred after the District Court entered its judgment, it is not clear what would happen to Commissioner Bowman if this Court were to vacate its stay and dismiss this appeal, while leaving the District Court's judgment in place; for this reason, this appeal may not yet be moot.

In litigation initiated after the District Court entered judgment, the Alabama Supreme Court held that the Governor's appointment was valid as a matter of Alabama law. *Working v. Jefferson County Election Commission*, ___ So.2d ___, 2008 WL 2569255 (Ala. June 30, 2008), reproduced in the Brief in Opposition at 6a. The Court never rejected

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[1] The submission was later supplemented.

[2] Plump suggests that the State could have withdrawn the submission once this Court granted the Governor a stay pending appeal. Given that Governor Riley had told the District Court that the submission would be made, such a move would have been beneath a Sovereign. Additionally, Governor Riley's representation was made through an officer of the Court. Doc. No. 34.

Governor Riley's argument that the 1977 local law was unconstitutional, but instead resolved the case on another ground: The Court interpreted a subsequent Act (Act No. 2007-488) and found that it had repealed Act No. 77-784. Having resolved the appeal on statutory grounds, the Alabama Supreme Court soundly declined to address the constitutional issue. Brief in Opposition at 32a-39a. Of course, a legislative act repealing a statute does nothing to negate Governor Riley's argument that the local law was unconstitutional and, hence, void *ab initio*.

The Alabama Supreme Court further ruled that Act No. 2007-488 required a November 2008 election. Under the new Act, the Governor's appointee serves only until the next general election, not for the full unexpired term. Brief in Opposition at 39a-40a.

While the *Working* litigation is obviously related to this litigation, it presented issues distinct from those that were before the District Court. The question of whether the appointment was valid as a matter of Alabama law was one the District Court properly avoided. *See* Memorandum Opinion, JS at 6a. The question of how long the appointment would last was one that was never raised in this case. And, the *Working* Court did not even comment upon whether Section 5 required Governor Riley to submit the appointment for preclearance. Consequently, when the State of Alabama submitted for preclearance several matters arising out of the *Working* case, they were related to, but distinct from, the preclearance submission that arose out of this case. (Specifically, the State submitted the relevant portions of Act No. 2007-488 for preclearance. *See* Letter from Ala. Att'y Gen. Troy King to Chief,

Voting Section (July 28, 2008) (*Working* Supreme Court submission); Brief in Opposition at 4-5 & n.3.

Additionally, a third submission arising from the trial court's order on remand in *Working* was made. That submission concerned the details of holding an election in November when both the deadline for qualifying as a candidate and the primary election had passed.[3] Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission)

Immediately after the two submissions arising from the *Working* litigation were made, two of Plump's attorneys sued the State and the Jefferson County Election Commission on behalf of Doris Powell. Plaintiff Powell argued that the November 2008 election could not be held unless the preclearance submissions were approved, and that the February 2008 special election (the one held under the unconstitutional local law which had been repealed) must instead be enforced. *Powell v. State of Alabama*, Civil Action No. 2:08-CV-01345-LSC (N.D. Ala. 2008) (three-judge court). Plump tried unsuccessfully to substitute himself as the plaintiff in that case. Powell then moved to voluntarily

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[3] While back in the trial court on remand, Plump moved that court to enjoin Jefferson County election officials from complying with the Alabama Supreme Court decision if preclearance was not obtained. *Working v. Jefferson County Election Commission*, Civil Action No. CV-2008-900316 (Jefferson County Circuit Court, 2008), Motion of Plump to Amend Order on Remand (July 26, 2008). The trial court denied the motion. *Id.*, Order Denying Motion to Amend Order on Remand (July 28, 2008). The preclearance submissions were faxed to DOJ the same day.

dismiss her suit on September 5, 2008, and the motion was granted. *Powell*, Doc. Nos. 39 & 41.

At that point, there were three preclearance submissions pending before DOJ related to the Jefferson County Commission vacancy: (1) A submission that resulted from this case, seeking preclearance of the Governor's appointment; (2) a submission arising from the Alabama Supreme Court decision in *Working*, which concerned two Statewide provisions of Act No. 2007-488 which, in Jefferson County, repealed Act No. 77-784, shortened Commissioner Bowman's term, and made clear that the February 2008 special election results should not be certified; and, (3) a submission arising from the trial court's *Working* order, concerning election mechanics.

Last week, on September 15, 2008, DOJ issued its preclearance decision. As to the first submission, which was made as a result of the litigation in this case, DOJ concluded that "no determination by the Attorney General is required or appropriate" because the submission had been, in DOJ's estimation, "supersede[d]" by the second submission arising from the Alabama Supreme Court decision in *Working*. *See* Letter from Christopher Coates, Chief, Voting Section, to Ala. Att'y Gen. Troy King (September 15, 2008) ("State letter"), reprinted at 1a.

As to the second submission, DOJ did not object. *Id.* This means that the repeal of Act No. 77-784, the non-certification of the February special election results[4], the practice of gubernatorial appointment to

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[4] The State included the non-certification of the February 2008 special election results in its second submission. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July

fill vacancies on county commissions (Statewide), and the practice of the appointee serving until the next general election (Statewide) are now precleared. Accordingly, in Jefferson County, an election will be held this November to fill the last two years of Larry Langford's term. William Bell, the Democrat who "won" the February special election, will be the only candidate on the ballot; the Republican Party did not nominate a candidate and Commissioner Bowman was unable to qualify as an independent candidate. When Commissioner Bowman leaves office in November, *see* Ala. Code 11-3-1(d), this litigation will assuredly be moot; until that day, Commissioner Bowman serves by virtue of the Governor's appointment.

As to the third submission, DOJ spoke not a word, instead granting preclearance to what was apparently a redundant (and later) submission made by local officials. *See* Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008), reprinted at 4a.

As a practical matter, one might reason that DOJ's grant of preclearance to the State's *Working* submission and to the local officials' election mechanics submission essentially eliminates any need for preclearance of the original submission

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28, 2008) (*Working* Supreme Court submission). DOJ did not object, however its letter does not mention this change. *See* State Letter, reprinted at 1a. Instead, DOJ seems to have ignored that portion of the State's submission and instead precleared the change within the context of a separate submission that local officials apparently made. *See* Letter from Christopher Coates, Chief, Voting Section to Probate Judge Alan L. King and Supervisor of Elections Sidney F. Browning (September 15, 2008), reprinted at 4a.

made by Governor Riley. It is not entirely clear, however, that it moots this litigation.

The District Court held that a preclearance submission was required to avoid vacatur of the Governor's appointment and set a deadline for its attainment. The State made the submission under protest. In doing so, the State and the Governor endured the harm that comes from begging for federal permission to follow State law (more specifically, to avoid enforcement of an unconstitutional statute) in our otherwise federalist system of government. Never did the Governor waiver from his position that preclearance was not required under the circumstances in which he made the appointment. Moreover, for its part, DOJ did not grant preclearance; it declared the submission not "appropriate." State Letter, at 2a.

Thus, if this Court dismisses the appeal and leaves the judgment in place, all stays are lifted. Plump or a new plaintiff might argue that the District Court's judgment requires the appointment to be vacated immediately: the preclearance submission arising out of *this* case was *not* granted, and the only preclearance that was granted came well after the District Court's last deadline. If vacating this Court's stay while leaving the District Court judgment in place means that Commissioner Bowman is ousted from office, this appeal is not moot.

3. Even if this appeal were moot today, it is not because Governor Riley is the "loser" who has "left the fray," such that leaving the District Court's Judgment in place would be proper. Plump's Supplemental Brief at 5. Under no

circumstances has Governor Riley "left the fray"; nor has he lost.

The odd structure of the District Court's judgment left Governor Riley no choice but to have the State make the submission, which it did, under protest. Governor Riley has consistently preserved his argument that Section 5 did not reach the appointment. The State's concession that statutory changes did require preclearance cannot be substituted for the Governor's on-going insistence that preclearance of his appointment of Commissioner Bowman was not needed. Hence, the Governor has not "left the fray."

Furthermore, DOJ concluded that "no determination by the Attorney General is required or appropriate" as to the submission made in this litigation. State Letter, at 2a. That is, DOJ did not grant preclearance, as Plump said it did, Plump's Supplemental Brief at 3. DOJ instead disagreed with the District Court as to whether the submission was needed, deeming it "inappropriate" under 28 C.F.R. § 51.35. That is hardly a win for Plump, who had urged the District Court's action, and is hardly a loss for Governor Riley.

The cases Plump cites to urge this Court to leave the judgment in place are inapposite. In *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), the owner of an adult-oriented establishment appealed the denial of a license renewal application. After petitioning for certiorari, the owner withdrew its renewal application and closed its business. *Id.* Similarly, in *U.S. Bancorp. Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the case mooted on appeal because the parties settled their dispute. Dismissal (without vacatur) was considered

appropriate in those cases because "the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall*, 513 U.S. at 24. There was no comparable "voluntary action" here.

It was the Alabama Supreme Court's reasonable and judicious decision to resolve the *Working* appeal on statutory grounds, *cf. Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944), which gave the State no choice under Section 5 but to make additional preclearance submissions. Prior to that, it was the Legislature's imperative to pass Act No. 2007-488 to modernize county government. Governor Riley does not have a voice in the Alabama Supreme Court other than as a party, and he is under no obligation to veto legislation that might, down-the-road, be construed to harm his litigation position in an unanticipated fashion. The preclearance submission that was made for Governor Riley remained pending, and was declared inappropriate. Governor Riley bears no fault here; he has taken no "voluntary action" to walk away.

Given that, neither the Governor nor the State should be left under the weight of the District Court's judgment and any precedential value it may have. The harm is only exacerbated by the fact that the judgment was issued under the cloud of procedural error (skipping to the merits) and without the benefit of this Court's decision in *Riley v. Kennedy*, the *Working* litigation, and the September 15, 2008 determinations by DOJ.

Leaving the District Court's erroneous judgment in place would matter for another reason. All the talk of "winners" and "losers" is usually a precursor to an application for attorneys' fees. The fee issue

should, of course, be decided in the District Court, but this Court's actions will affect the arguments. Governor Riley will contend that fees are inappropriate when the following is true:

(1) Governor Riley's arguments that the practice of special elections was never in force or effect, that gubernatorial appointment was the coverage date practice, and that the District Court improperly skipped to the merits have not been tested on appeal.

(2) Facts relevant to Governor Riley's arguments and to other matters taken up by the District Court occurred after the District Court rushed to judgment and this appeal was taken.

(3) While the practice of gubernatorial appointment has been precleared, the preclearance was granted as a consequence of a submission arising out of the state-court litigation, not the submission arising out of this case.

(4) While the issues in this case are likely to become moot, or even if they already have, it is for reasons that were outside the Governor's control, and he has never waived the arguments raised in this appeal.

Governor Riley is not attempting to argue the attorneys' fee issue to this Court. Rather, his point is that relief Plump seeks (dismissal without vacatur) appears to be structured with the fee issues in mind. An additional reason that the judgment should be *vacated* and remanded is that Plump should not be characterized as the "winner" under the circumstances of this case.

CONCLUSION

This Court should note jurisdiction, and either reverse the District Court or vacate and remand. If this Court determines that the appeal is presently moot, or if the appeal becomes moot while it is still pending, this Court should vacate the District Court's Judgment and dismiss the appeal as moot, through no fault of the Governor.

Respectfully submitted,

Troy King
Attorney General
James W. Davis
Counsel of Record
Margaret L. Fleming
Misty S. Fairbanks
Asst. Attorneys General

STATE OF ALABAMA
Attorney General's Office
11 South Union Street
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September 26, 2008

U.S. Department of Justice

Civil Rights Division

CC:RSB:TFM:DJ:maf
DJ 166-012-2
2008-1576
2008-3861

Voting Section - NWB
950 Pennsylvania Ave., N.W.
Washington, DC 20530

September 15, 2008

The Honorable Troy King
Attorney General
Misty Fairbanks, Esq.
Assistant Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King and Ms. Fairbanks:

This refers to the changes in the procedures for filling vacancies on the Jefferson County Commission from special election by local act to gubernatorial appointment under Ala. Code § 11-3-6, pursuant to *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988) and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005); Ala. Act 2007-488, insofar as new Ala. Code §§ 11-3-1(b) and 11-3-1(f) provide procedures for filling vacancies on Alabama county commissions; the repeal by Ala. Act 2007-488 of former Ala. Code § 11-3-6; the repeal by Ala. Act 2007-488 of Ala. Act 1977-784; and, application of Ala. Code §§ 11-3-1(b) and 11-3-1(f) to Jefferson County pursuant to

Working v. Jefferson County Election Commission, --- So.2d ---, 2008 WL 2569255 (Ala. 2008), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on March 19, 2008, and July 28, 2008; supplemental information was received through August 19, 2008.

The Alabama Supreme Court, in *Working*, held that the appropriate method for filling vacancies on the county commission in Jefferson County is through the procedures contained in Ala. Act 2007-488 as it amends Ala. Code §§ 11-3-1(b) and 11-3-1(f), rather than by special election under the 1977 local act or by gubernatorial appointment for the remainder of the vacated term pursuant to former Ala. Code § 11-3-6, as described by *Stokes* and *Riley*. *See Working*, 2008 WL 2569255, at *8-*12. Therefore, your July 28, 2008, submission supersedes the method of filling vacancies embodied in former Ala. Code § 11-3-6, as described in *Stokes* and *Riley*, which was submitted on March 19, 2008. Accordingly, no determination by the Attorney General is required or appropriate concerning this earlier submission. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.35.

With respect to the remaining specified changes, the Attorney General does not interpose any objection. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. 28 C.F.R. 51.41.

According to your July 28 letter, some remaining parts of Ala. Act 2007-488, namely the

revisions it makes in Ala. Code 11-3-1(a), and that part of Ala. Code § 11-3-1(b) that enforces Ala. Code § 11-3-1(a), have not been submitted for review under Section 5 at this time. Your letter indicates that the State has yet to determine the nature of the actual changes in question. At such time as the nature of the changes is determined, such changes are subject to Section 5 review. Changes that affect voting are legally unenforceable unless Section 5 preclearance has been granted. *Clark v. Roemer*, 500 U.S. 646 (1991), 28 C.F.R. 51.10.

Because the Section 5 status of these changes has been before the courts in *Plump v. Riley*, No. 2:07-cv-1014-MEF (M.D. Ala.), *on appeal as, Riley v. Plump*, No. 07-1460 (U.S. Supreme Court), *Powell v. Alabama*, No. 2:08-cv-01345-LSC (N.D. Ala.), and *Working v. Jefferson County*, No. 08-cv-900316 (10th Jud. Cir. Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,

[signature illegible]
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record (see attached list)

[cc list omitted]

U.S. Department of Justice

Civil Rights Division

CC:TFM:DJ:par:maf
DJ 166-012-3
2008-4502

Voting Section - NWB
950 Pennsylvania Ave. N.W.
Washington, DC 20530

September 15, 2008

The Honorable Alan L. King
Probate Judge
Mr. Sidney F. Browning
Supervisor of Elections
Jefferson County Courthouse
716 Richard Arrington Jr. Boulevard North, Suite 130
Birmingham, Alabama 35203

Dear Judge King and Mr. Browning:

This refers to the changes occasioned by the Order on Remand from the Supreme Court of Alabama in *Working v. Jefferson County Election Commission*, --- So.2d ----, 2008 WL 2569255 (Ala. 2008), including the injunction against certification of the results of the February 5, 2008 special vacancy election, and the procedures for conducting the November 4, 2008, special vacancy election, for Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 26, 2008.

The Attorney General does not interpose any objection to the specified changes. However, we note

that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Since the Section 5 status of these changes has been before the courts in *Plump v. Riley*, No. 2:07-cv-1014-MEF (M.D. Ala.), *on appeal as, Riley v. Plump,* No. 07-1460 (U.S. Supreme Court),*Powell v. Alabama*, No. 2:08-cv-01345-LSC (N.D. Ala.), and *Working v. Jefferson County,* No. 08-cv-900316 (10th Jud. Cir. Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,
/s/ Timothy Mellet
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record (see attached list)

[cc list omitted]